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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-380

UNITED STATES OF AMERICA,
Respondent,
vs.
IRONWORKERS LOCAL 86, et al.,
Petitioners.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on May 17, 1971 (*infra* p. A-86).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 443 F.2d 544 (*infra*, pp. A-69–A-85). The District Court for the Western District of Washington did not file a written

opinion but it did make findings of fact and conclusions of law which are reported at 315 F.Supp. 1202.[1]

Initially the trial court entered two judgments against the Petitioners (*infra* pp. A-32–A-64). Several amendments to those judgments were subsequently entered. Of these various amendments one is especially important to this case and is set forth, *infra* pp. A-66–A-67. Requests for a stay of the mandatory provisions of the trial court's decrees were denied by the court below and by Mr. Justice Douglas.

JURISDICTION

The judgment of the Court of Appeals was entered on May 17, 1971. On July 16, 1971, Mr. Justice Douglas signed an order extending the time for the filing of this petition until September 15, 1971. The jurisdiction of this Court rests on 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. By its terms the Civil Rights Act of 1964 authorizes the Attorney General to initiate legal proceedings only in cases involving a "pattern or practice of resistance" to rights guaranteed by the Act. The first question posed is whether in such cases the Attorney General is required to prove that the Defendant habitually, consistently or uniformly engaged in a course of conduct aimed at denying rights protected by the Act. Stated differently, what

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[1] The findings of fact and conclusions of law are 84 (legal size) pages long. Because of the bulk of the document, the attendant printing expense and their limited importance to the case in its present posture, we have not printed the findings and conclusions as an appendix. However, nine xerox, spiral bound copies of the trial court's findings and conclusions have been filed with the Clerk of this Court.

(if anything) is the Attorney General required to prove in a case in which he alleges the existence of a "pattern or practice" of discrimination.

2. In this case the record—in the main—consists of stipulated facts (a 80 page pretrial order), depositions taken out of the presence of the trial court (a total of 67 depositions were admitted in lieu of live testimony) and exhibits (a total of 255 exhibits were admitted). The second question posed is whether in such a case does Rule 52 of the Civil Rules of Federal Procedure require an appellate court to reverse erroneous findings of fact made by the trial court.

3. The Act prohibits the courts from granting preferential treatment based on race or the establishment of employment quotas based on race (42 U.S.C., Sec. 2000 e-2(j), *infra* p. A-2). The Act also authorizes the courts to order affirmative action in cases of violations of the Act (42 U.S.C., Sec. 2000 e-5(g), *infra* p. A-9). The third question posed is whether a court is authorized to grant preferential treatment in employment based on race or establish racial employment quotas in those cases in which the court finds that employment rights protected by the Act have been violated.

STATUTES INVOLVED

The statutory provisions of the Civil Rights Act of 1964, hereinafter referred to as the Act, which are primarily involved are 42 U.S.C., Sec. 2000 e-2(c), (d), (j) and Secs. 2000 e-5(g) and 2000 e-6(a). In material part, these sections provide:

Sec. 2000 e-2(c):

"It shall be an unlawful employment practice for a labor organization—

(1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race . . .;

(2) to limit . . . its membership, or to . . . fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individuals race . . ."

Sec. 2000 e-2(d):

"It shall be an unlawful employment practice for any . . . joint labor management committee controlling apprenticeship . . . to discriminate against any individual because of his race . . . in admission to . . . any program established to provide apprenticeship . . ."

Sec. 2000 e-6(a):

"Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States . . ."

Sec. 2000 e-2(j):

"Nothing contained in this subchapter shall be interpreted to require any labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . .

> referred . . . for employment by any . . . or labor organization, admitted to membership . . . by any labor organization, or admitted to, or employed in, any apprenticeship . . . program, in comparison with the total number or percentage of persons of such race . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Sec. 2000 e-5(g):

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay. . . ."

The full text of these statutes, together with other portions of the Act and other federal statutes to which we will allude, are set forth *infra* pp. A-1–A-13.

STATEMENT OF THE CASE

Petitioners are acutely aware of the burden placed upon this Court in reviewing over 2000 petitions each year and the consequent importance of brevity. We further recognize that this Court does not sit to try facts; however, it ought not be isolated from them. We ask the Court to bear in mind that this petition is being filed on behalf of six separate organizations. While some facts and findings are common to all six, many are not. The physical size of the record further complicates matters.[2]

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[2] The court below noted that the "proportions [of the case] are reflected in the size of the reporter's transcript which alone numbers twenty volumes" (*infra* p. A-77).

1. The Parties

The Plaintiff and Respondent in this Court is the federal government represented by the Attorney General (Attorney General). The Defendants and Petitioners in this Court are four labor organizations and two labor-management apprenticeship committees.[3] The labor unions are Sheet Metal Workers Local 99, International Brotherhood of Electrical Workers Local 46, Plumbers and Pipefitters Local 32 and Iron Workers Local 86. The joint apprenticeship committees which are parties here are the Sheet Metal Industry JATC and the Plumbing and Pipefitting Industry JATC.

2. The Background

In late 1967 or early 1968 the Seattle Building and Construction Trades Council held a series of meetings with representatives of various government agencies and ethnic minority groups in an effort to increase minority participation in the unions affiliated with the Council (R.T. 1245-1248).[4] A King County Affirmative Action Committee was formed and additional meetings were held; however, the Committee's activities did not result in an increase in apprenticeship applications from minority groups (R.T. 1249-1251). Some affirmative results did come about from work by the Apprenticeship Information Center, operated in conjunction with Unemployment Compensation division of the State Department of Labor and

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[3] The structural ironworkers joint apprenticeship committee (JATC) was represented by separate counsel in the trial court and elected not to file an appeal. Operating Engineers Local 302 was also represented by separate counsel in the trial court but entered into a consent decree prior to trial. The remaining defendants in the trial court appealed and are parties to this petition.

[4] References to the reporter's transcript are cited "R.T.;" references to the Clerk's transcript are cited "C.T."

Industries (R.T. 1251). A state legislative session intervened (R.T. 1251-1252) and meetings were resumed—this time with representatives of the "Model Cities" program who insisted on quota hiring (R.T. 1252). The Council rejected this request (R.T. 1253). These events (i.e. the "Model Cities" meetings) occurred in the summer of 1969 (R.T. 1253).

In September of 1969 the Building Trades Council was considering the unilateral establishment of a minority recruiting program for apprenticeship (R.T. 1254-1255); however, a series of demonstrations by Negroes intervened (R.T. 1245). These demonstrations which involved among other things running a heavy bulldozer over an embankment at the University of Washington, received national press and television coverage. Several civil lawsuits followed and charges were filed with a litany of alphabet agencies, e.g., the OFCC (Office of Federal Contract Compliance, Department of Labor), NLRB, EEOC (Equal Employment Opportunity Commission), and the Washington State Board Against Discrimination, among others. A series of temporary restraining orders were entered by the trial court and on October 25, 1969, the Attorney General filed his complaint in this case.

Negotiations continued in an effort to reach an overall settlement of the then extant practical problems. The Building Trades Council agreed in writing to several different "plans" suggested by the Department of Labor (R.T. 1256-1269). None were acceptable to the contractors, the minority community, and the OFCC. On the eve of trial negotiations were terminated (R.T. 1269-D & E). According to one of the many Department of Labor representatives engaged in these meetings "The Seattle Building Trades Committee was the only group that [he] met with that bargained in good faith. . . ." (R.T. 1422-1423.) Given this background the Petitioners on the eve of trial were in much the same position as the Crown Zellerbach

Corporation recently found itself. That situation is best described by the Fifth Circuit's comment that "We cannot help sharing Crown Zellerbach's bewilderment at the twists and turns indulged in by government agencies in this case." **Papermakers Local 189 v. United States**, 416 F.2d 980, 997 (5th Cir. 1969), **cert. denied** 397 U.S. 919 (1970).

3. The Pre-Trial Proceedings.

In his complaint filed on October 25, 1969, the Attorney General alleged, *inter alia*, that "[t]he defendant unions and the joint apprenticeship and training committees have pursued and continue to pursue a policy and practice of discrimination against Negroes, on account of their race, with respect to employment opportunities in the trades within their jurisdictions" (C.T. 5). The Attorney General further alleged that the conduct of the defendants constituted ". . . a pattern and practice of resistance to the full enjoyment by Negroes of their right to equal employment opportunity guaranteed by Title VII of the Civil Rights Act of 1964" (C.T. 7).

Pretrial discovery proceeded along two basic fronts. The Attorney General concentrated primarily on an extensive examination of each of the defendant's records. The defendants, with substantially less manpower,[5] concentrated their efforts on deposing the Attorney General's witnesses. All parties waived the usual notice requirements to allow discovery to proceed on an expedited basis.

One of the agreements made between the Attorney General and the Petitioners to expedite discovery was to allow the Attorney General to copy and inspect the records of the Petitioners (R.T. 12-13). The only limitation upon this agreement was that the Attorney General would provide to the Petitioners copies of all documents (with the exception of minute books and correspondence) which he

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[5] See, e.g., the trial court's comment at R.T. 9.

had copied and upon which he intended to rely (R.T. 13). As of February 16, 1970, the date on which the trial commenced, not one copy of a document had been provided by the Attorney General (R.T. 13). The only material provided to the Petitioners to indicate which documents or records the Attorney General had inspected consisted of a stack of largely handwritten and often unintelligible notes taken by the persons who had examined the various records (C.T. 467-470, 471-475).

At the outset of the litigation, an Assistant Attorney General informally informed counsel for the Petitioners that the Attorney General had upwards of 100-150 Negro witnesses whom he intended to call (Pl. Ex. 247, pp. 2-3). Counsel for the Petitioners replied that if such were the case, then he intended to depose each of those witnesses prior to trial. Subsequently, another of the Attorney General's assistants stated on the record that the number of witnesses was probably closer to 80 (P. Ex. 247, p. 5). When pressed for the names of the witnesses for purposes of scheduling depositions, the Attorney General finally produced a list containing the names of 46 "possible discriminatees" (C.T. 57). Of that number, eight were named as witnesses against the Operating Engineers and Ironworkers JATC, neither of whom are parties to this appeal (C.T. 61-63).

During the months of December, 1969 and January, 1970, the Petitioners took the depositions of virtually all of the alleged discriminatees plus those of other witnesses for the Attorney General. During the same period, the Attorney General took the depositions of numerous union and apprenticeship committee officers or agents. All parties stipulated in the Pretrial Order that these depositions could be received in evidence as though the witness had testified in person (C.T. 831-832, 840-841, 851-852, 861-862, 876-877, 889-890). These depositions and the copies of numerous pieces of paper which the Attorney General

found in the defendants' offices provided, in large part, the "evidence" relied upon by the trial court in making its Findings of Fact.

4. The Record in the Trial Court, Its Findings and Order.

a. Sheet Metal Workers Local 99

One of the most puzzling factual situations is that involving Sheet Metal Workers 99. Eight Negro witnesses testified with respect to Local 99. Five testified by deposition and three testified orally. Of these, two were indentured Negro sheet metal apprentices who testified favorably to Local 99 (R.T. 1024-1030, Pl. Ex. 293, pp. 3, 24-27; Pl.Ex. 292, pp. 3-16). Their testimony was ignored. The other six were all welders and of these, two had been dispatched by Local 99 within a day or two after their initial appearance at the union hall (Pl.Ex. 243, p. 4; Pl. Ex. 243, p. 13). Another Negro welder appeared during lunch hour and was asked to return; however, he did not do so (Pl.Ex. 240, pp. 17-18). Another came to the union hall on several occasions and was told that no work was available (C.T. 1415). However, he made these inquiries because two of his Negro friends were then working as construction sheet metal workers (Pl.Ex. 241, p. 20). All of the foregoing undisputed facts came from the Attorney General's witnesses.

It is undisputed that welders are not required to take a journeyman examination (Pl.Ex. 238, p. 30; R.T. 476-477). It is also undisputed that the Attorney General's "discriminatees" were all welders.[6] Stated differently, there is no evidence that any Negro asked to or was asked

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[6] The only exceptions are Brooks and Blakely, Negroes who gave testimony favorable to Local 99 and the JATC (R.T. 1024-1030, Pl. Ex. 293, pp. 3, 24-27; Pl. Ex. 292, pp. 3-16). Both were second year apprentices at the time of the trial. The courts below ignored this favorable testimony.

to take the journeyman examination. Yet the trial court inexplicably made a series of findings suggesting that the journeyman's examination was unfairly administered on two occasions, i.e., unqualified persons were given passing scores (F.F.&C.L., pp. 27 and 28, esp. F.F. 21).

Based on this type of evidence from the Attorney General's witnesses the trial court found a "pattern or practice" of discrimination. But at **no point** in the reporter's transcript or the clerk's record or the trial court's findings can one find a single word concerning the meaning of the critical statutory language—"pattern or practice."

b. **Sheet Metal Industry JATC**

Insofar as the factual findings of discrimination against the Sheet Metal Industry JATC (and the Plumbers and Pipefitters JATC, as well) are concerned, they were reached by two devices—(1) use of evidence ruled inadmissible, and (2) disregarding testimony given by "discriminatees" which was favorable to the apprenticeship committee. **Prior** to the commencement of this suit seven out of one hundred sheet metal apprentices were Negro (Finding No. 3, p. 30 F.F. & C.L.; C.T. 849; R.T. 1027; Pl.Ex. 293, p. 4; Pl.Ex. 292, pp. 4-5) Two of the alleged "discriminatees" had been in the program for several years prior to the commencement of this suit. Both gave testimony favorable to the JATC but this testimony was ignored.

According to Blakely, an alleged discriminatee, Glenn Arnold (who was a JATC member) "encouraged me" (Pl.Ex. 292, p. 16). Arnold also asked Brooks, an indentured Negro second year apprentice, to refer his friends for application (Pl.Ex. 293, p. 34). The same was true with respect to Negro apprentice Blakely (Pl.Ex. 292, p. 11). Several years prior to the suit a scholarship program was established to assist "culturally deprived" persons to qualify for apprenticeship in the Sheet Metal Industry (R.T. 1523-1525, Def.Exs. D-1, D-3, D-4).

These facts are undisputed, yet the lower courts (disregarding these facts) found a "pattern or practice" of discrimination. As in the case of the Plumbers and Pipefitters JATC, this was accomplished by simply drawing conclusive presumptions from evidence that had been ruled inadmissible.

We previously pointed out that the parties agreed prior to trial to an expedited discovery procedure, subject to the condition that the Attorney General provide Petitioners with copies of any documents or records which he copied. As of the first day of trial this commitment had not been fulfilled. From the largely unintelligible notes which were provided to Petitioners (Df's. Motion to Quash, C.T. 467) the Attorney General's statistician prepared charts relating to both the Sheet Metal and Plumbers and Pipefitters JATC (R.T. 1141-1142; Pl.Exs. 97, 172, 183). The first set of charts were apparently based upon the "notes" referred to above. During the trial and at the insistence of the trial court **Petitioners were required to provide the Attorney General** with copies of apprenticeship application forms notwithstanding the fact that he had had unlimited access to these forms during the five months preceding trial. The Attorney General's "charts" were withdrawn and revised—because of patent errors—on at least two occasions (R.T. 1097, 1140-1141).

Petitioners strenuously objected to the consideration of these charts, taking the position that the Business Records Statute, 28 U.S.C., Sec. 1732 (*infra* pp. A-12-A-13) barred their admissibility.[7] The trial court sustained this objection stating "the contents of these forms as to the

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[7] In addition to the express language of the statute, Petitioners relied upon: **Bisno v. United States**, 299 F.2d 711, 718 (9th Cir. 1962); **Standard Oil Company of California v. Moore**, 251 F.2d 188, 214 (9th Cir. 1957); **In re Holzopfel's Sons**, 249 F.2d 861 (7th Cir. 1957); **U.S. v. Martin**, 167 F.Supp. 301 (N.D. Ill. 1958); and **R. P. Farnsworth & Co. v. Continental Marble Co.**, 276 F.Supp. 349, 355-356 (D.P.R. 1967).

truth I feel could not be binding upon the defendants. . . ." The trial court received the apprenticeship application forms only to show the subject matter of the "printed forms. . . ." (R.T. 1169-1170, 1172-1173). The courts below, in effect, made express findings of "nepotism" based upon these inadmissible forms. Indeed, without a scintilla of record evidence the lower court expanded upon the trial court's somewhat guarded language and concluded (*infra* p. A-77):

> ". . . the information contained in the applications was not proffered to prove the statements therein, but to show what information was sought by the apprenticeship committees in the applications and **relied upon them** in making their decisions." (Emphasis added.)

We urge the Attorney General to set forth either in a footnote or an appendix, the record citations or testimony supporting this conclusion.

Viewed from the Petitioners' point of view, the most significant event occurring in the trial court concerned the Sheet Metal JATC. Shortly before the trial court issued its formal findings a letter was sent to all counsel advising those concerned of the trial court's disposition of the issues involved. The trial court said in support of its conclusion that the Sheet Metal JATC had engaged in a "pattern and practice" of discrimination that the Sheet Metal JATC had ". . . ON OCCASION [given] preference to relatives and friends of union members with respect to apprenticeship opportunities." (C.T. 1353, emphasis ours.) This statement by the trial court consists of the **only** indication of the legal standard used by the trial court to weigh the record evidence. Later on we will show that the Court of Appeals was more explicit.

c. The Plumbers and Pipefitters JATC

In material aspect the findings of the trial court relating to the Plumbers and Pipefitters JATC parallel those made with respect to the Sheet Metal Workers JATC, particularly insofar as findings of nepotism based upon the Attorney General's "charts" are concerned (see esp. F.F. 8(g) and 9, pp. 57-58). Without detailing all of the particular findings we cite one of the situations upon which the trial court placed major emphasis—i.e., alleged discrimination against Sanders (F.F. & C.L., ¶ 11, pp. 80-81). Mr. Falconer, then a business agent and apprentice coordinator, according to a **deposition** witness on occasion made racially derogatory statements (F.F. & C.L., ¶ 17 b, pp. 50-51); however, Sanders, an alleged discriminatee said "nobody [at Local 32] has ever said anything to me out of the way of race. . . ." (R.T. 729). The trial court also found that Falconer's action in finding Sanders a temporary job in the shipyards constituted discrimination. However, that was not the way Sanders viewed the matter. He said that but for Falconer's efforts "I might have starved to death and I probably wouldn't be here today" (R.T. 730). Another and final example concerns an alleged discriminatee named Carrington (F.F. & C.L. 9, pp. 58-59). The problem with this finding is that at the time of the alleged discrimination "which occurred shortly **before** the effective date of the . . . Act" (F.F. & C.L. 9, p. 58), Carrington filed a formal complaint with the Washington State Board of Discrimination which **he** later withdrew (R.T. 1391, 1394, 1397). Although these facts came from the files of the State Board Against Discrimination the findings and opinion in the courts below take no cognizance of these undisputed facts.

d. **Plumbers and Pipefitters Local 32**

As is true with regard to many of the trial court's findings there is a good deal of overlapping. For example, Sanders—whose testimony was just discussed—also appears as a discriminatee in that portion of the trial court's findings relating to Local 32 (F.F. & C.L. 14, p. 46). Particularly interesting is the difficulty the trial court had in concluding that Local 32 had discriminated against a man named Hampton (F.F. & C.L., 15-16, pp. 47-50). This is understandable in view of his testimony elicited by the Attorney General that he was fired by Todd Shipyards (R.T. 648, 686) and was told by Lockheed (the other major shipyard in Seattle) that they didn't want him either (R.T. 647-650, 696-697). He also filed charges with both the NLRB and the State Board of Discrimination but withdrew the latter and the former were found to be without merit (R.T. 687, 689). He also said "Every job I have been on I have met with racial discrimination ever since I can remember" (R.T. 653) but a few minutes later, complained because Local 32 "demanded" that he join the Union (R.T. 691). Neither the personnel manager at Lockheed (R.T. 1314-1315) nor Todd (R.T. 1434) considered him to be a qualified journeyman. This evidence notwithstanding, the trial court made the startling statement that Local 32 "did not establish that Hampton was unemployable" (F.F. & C.L. 16 e, p. 50). Having found discrimination in Hampton's case it is not surprising that the trial court read prejudice into any and everything Local 32 did or did not do—if a Negro was involved.

e. **International Brotherhood of Electrical Workers Local 46**

One of the threads of irony running through the record in this case is the fact that most of the Negro witnesses called by the Attorney General and relied upon by the

courts below were persons already working out of or participating in various training programs sponsored by Petitioners. The "case" against the Electricians is particularly illustrative of this point. Of the **nine** Negro witnesses relied upon by the trial court in making its findings, **seven** were either working out of the Electricians' hall or had previously done so.[8] Of the other two, one, Willie Dones was an electrical contractor who, in his own words, could not be a union member and a contractor at the same time (Pl.Ex. 267, p. 19). The other Cornell Huggins, had once dropped into the hiring hall sometime in 1964 while on active duty in the Navy (Pl.Ex. 271, pp. 9, 13). This occurred prior to the effective date of the Act. (Pl.Ex. 266, p. 13) and he has not been back since that time (Pl.Ex. 266, pp. 10-11).

An example of "discrimination" cited by the trial court (F.F. & C.L. 23, p. 72) involves a Willie Dones who testified only by way of deposition. Dones in his deposition said that he went to the Electricians in 1962,[9] and "applied for a job" (Pl.Ex. 267, p. 11). Dones, who was aware of how a hiring hall works (Pl.Ex. 267, p. 13), was told that no work was then available (Pl.Ex. 267, p. 11). The same year Dones started an electrical appliance service business (Pl.Ex. 267, pp. 2-4). At that time, the Electricians tried to get him to sign a union contract and have continued to do so until present (Pl.Ex. 267, p. 19).

The Electricians were more successful in the case of **Scott Electric**—a Negro contractor. "Discriminatee" Harold Wright (F.F. & C.L. 20, 31, pp. 70, 72) was working for Scott Electric when it was organized by the Electricians. The discrimination which he suffered at the hands

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[8] The seven were George, Wright, Stearn, Evans, Pearson, Jacobs and Alford.

[9] The Act became effective in July, 1965.

of the Electricians is best described by his testimony given in open court (R.T. 870-872):

"Q. Now, when you went to work for Scott Electric, how many men were on the crew?

"A. When I went to work for Scott?

"Q. Yes.

"A. Three.

"Q. Tyree Scott, did he work, himself?

"A. Right.

"Q. And yourself?

"A. Right.

"Q. And one other man?

"A. Right.

"Q. Was he a Negro also?

"A. Right.

"Q. Now, how long did you work for Tyree before Tyree signed up with the union?

"A. A very short while.

"Q. Did you get any wage increase when Tyree signed up with the union?

"A. Definitely.

"Q. Tyree was paying less than union wages?

"A. Right.

"Q. How much less?

"A. Well, I was getting $3.50 from Tyree.

"Q. When he signed up with the union, how much did you make?

"A. $5.80, something, whatever it was.

"Q. You got health and welfare benefits when Tyree signed up with the union?

"A. Right.

"Q. Health insurance?

"A. Right.

"Q. Did Tyree have health insurance before he signed up with the union?

"A. No.

"Q. You are under a pension plan when Tyree signed up with the union, aren't you?

"A. Yes.

"Q. Did Tyree have a pension plan before he signed up with the union?

"A. No.

"Q. Now, you worked for Tyree as a union employee up until the fall of last year, is that right?

"A. Pardon me?

"Q. You worked for Tyree Construction—Tyree Scott up until the fall of last year?

"A. In November, right.

"Q. November?

"A. Yes.

"Q. And then you quit of your own accord?

"A. Right.

"Q. Did you have your job with Cochran before you quit Tyree?

"A. Yes."

So be it.

f. Iron Workers Local No. 86

The Court will recall that in the instance of both Plumbers & Pipefitters Local 32 and Electricians Local 46 the courts below ignored the fact that the "discriminatees" filed charges with the NLRB or the State Board Against Discrimination and that such charges were either dismissed for lack of merit or withdrawn by the charging party. The State of Washington was one of the first states to pass a law prohibiting discrimination in employment based on race.[10] The chief investigator for the State Board testified that during the twenty plus years of the existence of the State Board, only two charges against building trades locals—having merit—were filed

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[10] The statute was passed in 1949. R.C.W. 49-60-010 *et seq.*

with the State Board (R.T. 1344-1355, 1397-1398). Those involved Lewis & Murray—Negro welders found to have been discriminated against by Iron Workers Local 86. Unlike its disregard of favorable evidence from the State Board or the NLRB in the case of Electricians Local 46 and Plumbers Local 32, the trial court in the case of the Iron Workers focused its attention primarily upon the treatment of Lewis and Murray and the rulings of the State Board Against Discrimination (F.F. & C.L. 11, 14d, 15c, pp. 6-8, 11, 12).

The trial court also made much of the fact that a group of rodmen[11] were issued journeymen cards by the International (F.F. & C.L. 13a, p. 9). This is a fact but there is not a scintilla of evidence that a Negro ever sought employment as a rodman. In fact—and as in the case of most of the Petitioners—the "discriminatees" were welders.[12] The fact that some Caucasians were blanketed in as rodmen is totally irrelevant to the question of the employment of Negro welders. The point was stated most succinctly by discriminatee Howard Lewis—a Negro welder—who said in open court that he would not accept a job as a structural ironworker or as a rodman (R.T. 1018-1019).

g. The Testimony of and the Findings Concerning Cornelius Bradford

Accepting the findings below, no man has suffered more racial discrimination than Cornelius Bradford, who also was considered qualified to testify concerning the "repu-

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[11] Essentially this work involves physically transporting and placing or tying reinforcing iron rods in forms to be filled with cement.

[12] While he is entitled to try and try again, the Attorney General must concede that welding is a tool of the trade and not a separate craft (R.T. 1604-1605). His contrary contention—though successful in the lower courts—is purely and simply without merit.

tation" of the Petitioners (R.T. 624). According to the trial court, Bradford (who like so many others is a welder) was discriminated against by Iron Workers Local 86 (F.F. & C.L. 13c, p. 10), Sheet Metal Workers 99 (F.F. & C.L. 14, p. 26), and Plumbers and Pipefitters Local 32 (F.F. & C.L. 12a, p. 45).

Bradford, a member of a construction local, Boilermakers Local 104 (Pl.Ex. 239, p. 8) is a highly qualified welder (R.T. 606). He earned $18,000 in 1968 (R.T. 612-613) and $12,000 in 1969 (R.T. 615). In his deposition he stated that he did not want to be a member of the Iron Workers, Sheet Metal Workers, or the Plumbers and Pipefitters; however, he testified exactly to the contrary during the trial (R.T. 619-622). When he was out of work Bradford was accustomed to "making the rounds of the unions" (Pl. Ex. 239, p. 21). Bradford reluctantly admitted that during the course of making his rounds no one ever said anything which would indicate prejudice against him (R.T. 625-627).

As previously noted the trial court read discrimination into every contact he had with any of the Petitioners and in addition cited his testimony concerning the Petitioners' "reputation". The best way to evaluate Bradford is to quote his testimony given in open court (R.T. 624):

> "A. Yes. It is all you white people. It is like this. I break it down to you.
>
> "Q. All right.
>
> "A. That you white, and unions are white, and everybody look around you, who is in the courtroom. Everybody in here is white. There isn't a black besides the guys testifying. It is society. It is all of you guys out there."

The foregoing extremely abbreviated summary of the record and the trial court's findings fairly describes the atmosphere in which the order was written.

h. The Order of the District Court

Assuming that the trial court correctly found that each of the Petitioners had engaged in a "pattern or practice" of discrimination, we have no quarrel with the prohibitory portions of the order. The order also contains affirmative provisions concerning newspaper advertisements and visits to predominately Negro schools. We are not concerned with either since the former is largely moot and the second is of no practical significance. Similarly, assuming that the Attorney General has proved his case, Petitioners are not especially concerned with those portions of the order equating non-union construction experience with union construction experience for referral purposes.

There are, however, a number of features of the order which particularly disturb Petitioners and which warrant this Court's serious attention. They are as follows:

(1) In the case of each of the Petitioner unions the trial court decreed that any statement on a Negro's referral application of referral is presumptively true (*infra*, pp. A-38, A-41, A-44, A-47). Other applicants for referral must provide proof of their experience or qualifications.

(2) Negro applicants for referral must be dispatched if requested by name—regardless of their position on the out-of-work list, even though Caucasians, or for that matter, other minorities, do not have the same right (*infra*, pp. A-38-A-39, A-41, A-44, A-47).

(3) One Negro "special apprentice" (who by the court's definition is a person who is neither qualified for apprenticeship nor a qualified mechanic (*infra*, p. A-54), must be dispatched for every tenth mechanic dispatched (*infra*, p. A-67).

(4) Thirty per cent of **each** apprenticeship class or seven apprentices, "whichever is the **greater**", must be Negroes (*infra*, p. A-53).

Petitioners are concerned with these provisions because they plainly constitute preferential treatment for Negroes and establish racial quotas. The use of adjectives such as goals and ranges cannot change the unmistakable import of the trial court's orders.

5. The Opinion of the Court of Appeals for the Ninth Circuit.

By the time this case reached the Court of Appeals its dimension and contours became more manageable. With respect to Petitioners' contention that the statutory term "pattern or practice" meant a customary, habitual or uniformly engaged in course of action, the court summarily stated that "such an interpretation is overly restrictive and does violence to the meaning intended by Congress to be accorded that phrase" (*infra*, p. A-81). Yet a few sentences later the court below quoting authorities cited in our brief noted that Senator Humphrey indicated that the phrase referred to acts of " 'repeated, routine or generalized nature.' " The court below then referred to testimony (cited in our brief) from Deputy Attorney General Walsh who said that a "pattern or practice" referred to " 'regular procedures . . .' " (*infra*, pp. A-81-A-82). The court below also embraced the pernicious theory that mere statistical proof of a low Negro membership in relationship to population established prima facie proof of a "pattern or practice" of discrimination (*infra*, pp. A-79-A-80).

With respect to our complaint that the trial court's decrees established racial preference and racial quotas, the court below answered simply that other courts (appellate courts) had approved similar orders and that such

orders were necessary to the fulfillment of the purposes of the Act (*infra*, pp. A-84-A-85). Although the court below had the benefit of this Court's opinion, **Griggs v. Duke Power Co.**, ... U.S. ..., 3 FEP Cases 175 (1971), it took no note of the admonition that (Slip. Op. p. 6, 3 FEP Cases at 177):

> "Discriminatory preference for any group minority or majority, is precisely and only what Congress has prescribed."

REASONS FOR GRANTING THE WRIT

With respect to our statement of the case, it may be reasonably anticipated that the Attorney General would normally tender a counter statement—the essence of which would be a summary of the conclusionary findings of the trial court, coupled with the contention that Petitioners are merely re-arguing the evidence as they unsuccessfully did in the trial court and the Court of Appeals. There is no need to do so. Our statement of the case was intended only to (1) convey the atmosphere in which the case arose and was tried, and (2) highlight the nature of the second issue presented in this petition; namely, the role of an appellate court reviewing an essentially non-testimonial record. Petitioners frankly concede the truth of the two ultimate facts upon which the court below based its affirmance. The two ultimate facts are as follows: Except for the Sheet Metal JATC,[13] none of the Petitioners had their proportional quota of Negro construction division

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[13] The trial court found that the Sheet Metal apprenticeship program had seven Negroes out of 99 apprentices. The Sheet Metal apprenticeship program covers the most limited geographical area of any of the Petitioners. Its "jurisdiction" is limited to King County, Washington. According to unpublished 1970 census figures, the Negro population of King County represents less than 3.5% of the total population.

members or apprentices[14] and secondly, there is evidence in the record with respect to each Petitioner from which a trial court could infer and find that some post-act incidents of discrimination occurred. Under the case law, as it stands, this is more than enough for the Attorney General to prevail. However, if this is the standard to be applied in Title VII cases this Court should grant this petition and affirm the judgment below. Then, at least, practitioners could advise their clients that it is impossible to prevail in a Title VII "pattern and practice" case because the courts have created an irrebutable presumption of guilt. This Court's initial reaction to the statement just made, no doubt, will be to question whether counsel is overly zealous. Perhaps, but examine what in fact the appellate courts have done in Title VII cases.

I. The Court Below Explicitly Refused to Adopt the Universally Accepted Meaning of the Critical Statutory Language "Pattern and Practice" of Discrimination.

Title VII of the Act, after defining unlawful employment practices (*infra*, pp. A-1–A-2) establishes an Equal Employment Opportunity Commission to administer its provisions (*infra*, p. A-3). The Commission is authorized to receive and investigate charges of unlawful employment practices (*infra*, pp. A-5–A-6); however, if they arise in a state such as Washington which has a state anti-discrimination law, the Commission must defer to the state agency for a 60-day period (*infra*, p. A-6). Only then is the Commission authorized to proceed. Unlike most administrative agencies (e.g., the NLRB), the Commission

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[14] The Ironworkers do not represent employees employed by the Seattle shipyards. The other three petitioner unions do represent such employees and have a substantial number of Negro members employed as either journeymen or apprentice marine members.

does not issue "cease and desist" or "affirmative" relief orders; rather it attempts to conciliate and informally resolve complaints (*infra*, pp. A-7–A-8). If it is unsuccessful the complainant is then free to file a private, civil suit (*infra*, p. A-8). The only role which Congress gave to the Attorney General involves cases in which there exists a "pattern or practice of resistance" to rights guaranteed by the Act (*infra*, p. A-10).

To date ten Title VII cases have been heard on their merits at the appellate level. In each case, regardless of the findings in the trial court, the Court of Appeals found prohibited discrimination. Except for the case at bar and a Sixth Circuit Decision, *infra*, fn. 34, the appellate courts have totally ignored the statutory phrase "pattern and practice." The die is cast and the courts below content themselves with simply citing other consistent, result-oriented opinions. The cases fall into three general groups which we briefly summarize. First, there are a group of "pattern and practice" cases involving industrial situations where **prior to the Act** "departmental seniority" prevailed and most of the Negroes working in the plant held positions in lower rated and less desirable departments. The efforts of labor or management, or both, after the Act became effective were uniformly considered insufficient or wrong, or both.[15] A second group (of two cases) involved the transportation industry which historically has had separate seniority lists for city drivers *vis-a-vis* over-the-road, or long distance drivers. Here with **no evidence** of acts of discrimination, the courts by fiat have found discrimination because there are many black and white city drivers but few Negro long line

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[15] **U.S. v. Bethlehem Steel Corp.**, ... F.2d ..., 3 FEP Cases 589 (2nd Cir. 1971); **U.S. v. Hayes International Corp.**, 415 F.2d 1038 (5th Cir. 1969); **Papermakers Local 189 (Crown Zellerbach Corp.) v. United States**, 416 F.2d 980 (5th Cir. 1969) **cert. denied** 397 U.S. 919 (1970).

drivers.[16] Finally there are the building trades cases and these have turned in the main on a finding of a statistical imbalance insofar as Negro union membership or apprenticeship participation is concerned.[17]

As noted above the appellate courts did not concern themselves with the meaning of the phrase "pattern or practice." The court below—at Petitioners' repeated insistence—considered and rejected our view of the Act as being "overly restrictive." It was and is our contention that the phrase "pattern and practice" refers to a habitual or uniform course of conduct. The Congress so understood the term, it is so defined in the dictionaries and has been repeatedly so defined by the courts in other legislative settings. Yet in cases arising under Title VII the courts have either ignored this language[18] or as in the case at bar, rejected the plain meaning of the Act. At this late date this Court and only this Court can put the lower courts back on the track laid out by Congress.

According to Senator Humphrey the Attorney General's role was limited to "significant cases of discrimination . . ." (110 Con.Rec. 12722, *infra*, p. A-28). He considered the phrase "pattern and practice" as applying where "an . . . employer . . . consistently . . ." denied rights guaranteed by the Act (110 Con.Rec. 14239, *infra*, p. A-28). At another juncture Senator Humphrey explained that the phrase referred to "repeatedly and regularly engaged acts prohibited by the statute" (110

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[16] **Bing v. Roadway Express, Inc.**, ... F.2d ..., 3 FEP Cases 616 (5th Cir. 1971); **Jones v. Lee Way Motor Freight, Inc.**, 431 F.2d 245 (10th Cir. 1970).

[17] **U.S. v. IBEW Local 38**, 428 F.2d 144 (6th Cir. 1970), **cert. denied**, 400 U.S. 943 (1970); **U.S. v. Sheet Metal Workers Local 36**, 416 F.2d 123 (8th Cir. 1969); and, of course, the case at bar.

[18] See cases cited in footnotes 15, 16 and 17, *supra*.

Con.Rec. 14270, *infra*, p. A-28). Representative Celler also so understood the phrase (110 Con.Rec. 15895, *infra*, p. A-28) as did the Attorney General during the debates on the Voting Rights Act of 1957. The full text of these quotes and legislative references is set forth, *infra*, pp. A-28, A-29. **There is not one contrary word in the debates.** Yet the obvious import of the words of the sponsors of the Act just quoted was obviously ignored by the court below (*infra*, pp. A-81–A-82).

The dictionaries—not surprisingly—define the words "pattern and practice" as did the sponsors of the Act. The word "Pattern" has been defined as ". . . an established mode of behavior or cluster of mental attitudes, beliefs, and values held in common by the members of a group.[19]" In another sense, a "pattern" is a "fully realized form, original, or model accepted or proposed for imitation.[20]" It is ". . . something regarded as a normative example. . . .[21]" A "pattern" is "[a]nything fashioned, shaped, or designed to serve as a model . . . ; a . . . design, plan or outline.[22]" To be a "pattern," something must be "[a] matrix, a mould . . . a signal example.[23]"

A "practice" is "[r]epeated or customary action; habitual performance; a succession of acts of similar kind; habit; custom; usage. . . .[24]" To engage in a "practice" is ". . . to do or perform [something] often, customarily,

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[19] **Webster's Third New International Dictionary** (Springfield, Mass., G. & C. Merriam Co., 1961), p. 1957.

[20] **Webster's**, p. 1567.

[21] **Webster's**, p. 1657.

[22] **The Oxford English Dictionary** (Oxford: Clarendon Press, 1969), p. 565.

[23] **Oxford**, p. 565.

[24] **Black's Dictionary of Law**, Fourth Edition (St. Paul: West Pub. Co., 1951), p. 1335.

or habitually: make a practice of: engage regularly in.[25]" Put another way, a "practice" is [t]he habitual doing or carrying on of something; usual, customary, or constant action . . .[26]" A "practice" is [a] habitual way or mode of acting. . . .[27]" In sum, "practice" . . . ordinarily implies uniformity and continuity, and does not denote a few isolated acts, and uniformity and universality, general notoriety and acquiescence, must characterize the actions on which a practice is predicated." 72 C.J.S. 469.

In every legislative context other than Title VII cases the courts have accorded the term "pattern and practice" the same meaning given by sponsors of the Act and the same meaning found in virtually any dictionary one can find. Examples in point are cases arising under the Packers and Stockyards Act, 7 U.S.C. Sec. 181 *et seq.*, *infra*, p. A-13[28], cases arising under World War II price regulations[29] and cases involving the maritime industry.[30] Judge Learned Hand describing these words said "[their] essence is . . . uniformity." **J. C. Francesconi & Co. v. Baltimore & O. R. Co.**, 274 Fed. 687, 691 (S.D. N.Y. 1921).

The court below dismissed our contention that the statutory phrase "pattern and practice" refers to a customary, habitual, regular or uniform course of action.

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[25] **Webster's**, p. 1780.

[26] **Oxford**, p. 1219 (emphasis in original).

[27] **Oxford**, p. 1219.

[28] **McClure v. E. A. Blackshere Company**, 231 F.Supp. 678, 682 (D.C. Md. 1964); **Guenther v. Morehead**, 272 F.Supp. 721, 727 (S.D. Iowa 1967).

[29] **Wells Lamond Corp. v. Bowles**, 149 F.2d 364, 366-367 (U.S. Emergency Ct. of App. 1945).

[30] **United States Shipping Fleet Corp. v. Levensaler**, 290 Fed. 297, 301-302 (D.C. Cir. 1923).

However, sponsors of Title VII of the Act so understood the term, as do lexicographers and as have the courts in repeated decisions involving the same language in other statutes. Because of the major dislocations in employment relations and practices, the tremendous litigation burden placed upon an employer or union faced with a Title VII case and the large number of such cases which have been filed and reached the appellate level or are pending, it is essential that this Court establish the basic guidelines to be followed. The lower courts have consistently refused to face up to this task or as in the case at bar, have rejected the clear meaning of the Act.

Two other examples of the result-oriented process which has developed under Title VII deserve comment. Several appellate courts, including the court below[31] have adopted as a rule of law the concept that the Attorney General establishes a pattern and practice of discrimination merely by showing a statistical imbalance in the composition of a work force, union membership or apprenticeship group.[32] The floor managers of the bill when it was in the Senate expressly disavowed such an interpretation of the Act, *infra*, p. A-19[33]. Except

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[31] *Infra*, pp. A-79–A-80.

[32] **Bing v. Roadway Express, Inc.**, ... F.2d ..., 3 FEP Cases 616, 618 (5th Cir. 1971); **Parkham v. Southwestern Bell Co.**, 433 F.2d 421, 426 (8th Cir. 1970); **Jones v. Lee Way Motor Freight, Inc.**, 431 F.2d 245 (10th Cir. 1970), **cert. denied** and, of course, the court below, *infra*, pp. A-79–A-80.

[33] The lower courts have also held that evidence of post-act discrimination is not required in cases arising under Title VII. **Bing v. Roadway Express, Inc.**, ... F.2d ..., ..., 3 FEP Cases 616, 617 (5th Cir. 1971); **U.S. v. IBEW Local 38**, 428 F.2d 144, 150 (6th Cir. 1970), **cert. denied** 400 U.S. 943 (1970); **U.S. v. Sheet Metal Workers, Local 36**, 416 F.2d 123, ... (8th Cir. 1969); **Jones v. Lee Way Motor Freight, Inc.**, 431 F.2d 245, 247 (10th Cir. 1970), **cert. denied.**

where necessary to achieve a desired result[34] the courts have disregarded the plain meaning of the Act insofar as the Attorney General's role in Title VII cases is concerned and then proceeded to create an irrebutable presumption of guilt. This is so because in every skilled trade, craft, occupation or profession, Negroes are not proportionately represented and to the extent they are represented they occupy a disproportionate number of lower paid positions.[35]

"Negroes were 15 percent of all Federal Government employees in 1970, compared with 13 percent in 1965. However they hold only 3 percent of the higher grade jobs under the Federal Classification Act, 4 percent of the higher grade Postal Field Service jobs, and less than 10 percent of the Wage Systems (blue collar type) jobs paying $8,000 and over in 1970." B.L.S. Report No. 394 (Departments of Commerce & Labor) **The Social and Economic Status of Negroes In The United States**, 1970, p. 6-7.

The Attorney General's own office provides an excellent case in point. As of November, 1967, only 0.9% Negroes

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[34] Although the Sixth Circuit has disregarded the phrase "pattern and practice" in Title VII cases brought by the Attorney General [e.g., **U.S. v. IBEW Local 38**, 428 F.2d 144 (6th Cir. 1970), **cert. denied** 400 U.S. 943 (1970)], it reversed a defendant's verdict in **King v. Laborers Local 818**, 443 F.2d 273 (6th Cir. 1971)—an individual Title VII suit. The stated basis for the reversal was the trial court's reference to "pattern and practice" in its instructions. According to the Sixth Circuit's **King** opinion "The District Court erred in charging the jury in accordance with the **high statutory standard of proof required by Congress of suits brought by the United States Attorney General**. . . ." 443 F.2d at 278. (Emphasis ours.)

[35] "Negroes . . . occupy a disproportionate share of low paid jobs and blue collar jobs on Federal payrolls, just as they do in private industry." U. S. Dept. of Labor, Bulletin No. 1511, June, 1966, "The Negroes in the United States," p. 43. Accord: 1968 Annual Report, United States Civil Service Commission, "Challenge and Change," p. 77.

occupied G.S. 12 through 18 positions, only 2% held G.S. 9 through 11 ratings. The vast majority of the Negroes within the Attorney General's department were in the G.S. 1 through 4 category, i.e., earning under $5,000 per year. U. S. Civil Service Commission, "Study of Minority Group Employment in the Federal Government 1967," p. 15 (Def.Ex. A-11, p. 4). If as the courts below have held a "pattern and practice" is proved by showing a statistical imbalance then it follows that every craft and profession is ipso facto guilty—including the Attorney General. This pernicious, numbers game theory ignores many obvious factors such as group educational attainment,[36] however, the numbers theory has been widely accepted in the appellate courts[37] and as we said before, only this Court can put the lower courts back on the course intended by the Congress when it enacted the Civil Rights Act of 1964. Given no burden of proof by the courts—other than to show a statistical employment imbalance—and freed of any obligation to show any post-act discrimination it is not surprising that every Title VII case decided on the merits at the appellate level

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[36] A demographer called by the Attorney General admitted on cross-examination that (R.T. 988, 989, 989-991):

> "'Well-defined and consistent matters on socio-economic status exist among non-whites in the United States. Japanese ranked highest in educational status, with whites and Chinese in second and third places respectively. Filipinos rank fourth and Negroes and Indians with identical scores lowest. The occupational hierarchy is similar: Japanese, Chinese and Caucasians hold first, second and third places respectively. Filipinos are fourth, Indians fifth and Negroes sixth.
>
> "'On the income dimension, the white male population is in first place, followed by Japanese and Chinese. Filipinos are again in fourth place, but the rank and positions of Negroes and Indians are reversed.'"

[37] See cases collected in footnote 33, *supra*, p. 29 and the comments of the court below in the case at bar, *infra*, pp. A-79–A-80.

has resulted in a judgment for the Plaintiff. For as Senator Fulbright observed: "If discrimination is difficult to prove [and as we have shown it has been presumed in Title VII cases], it is doubly difficult to disprove." 110 Con.Rec. 9601, *infra*, p. A-31.

II. **The Court Below in Disregard of Its Own Prior Decisions and the Decisions of Other Appellate Courts Applied the "Clearly Erroneous" Standard of Review Set Forth in Rule 52 Even Though the Critical Evidentiary Findings of the Trial Court Turned Upon Stipulations, Depositions and Exhibits.**

As we pointed out at the outset most of the record—simply viewed from a physical point of view—consists of "evidence" other than live testimony taken in open court, *supra*, p. 3. The court below did not seriously contest this point, *infra*, pp. A-71, A-75. Had such a contention been made it would have been unsupportable for 423 of the trial court's record references (or 67% of the total number of references) were to the pretrial order, depositions and exhibits. Rather, the court below took the position that even if this were so the "clearly erroneous" rule was applicable, *infra*, p. A-75. The court below also recognized that the Fifth and Seventh Circuits have taken the contrary view, *infra*, p. A-75, fn. 12.

The conflict among and withir the circuits is rather dramatically underscored by the very case principally relied upon by the court below. **Lundgren v. Freeman**, 307 F.2d 104 (9th Cir. 1962). For in its **Lundgren** opinion the court below said: "There are Ninth Circuit cases on both sides of the question. . . ." 307 F.2d at 114. One writer put it this way—". . . the authorities are indescribably confused. Even within a single circuit, decisions vacillate inexplicably from one position to another."

Wright, "Federal Courts", (Hornbook Series) West Publishing Co., 1963, p. 375.

There is no doubt about the conflict and confusion at the circuit court level with regard to the proper role of an appellate court in a case which does not turn upon oral testimony given in open court. In this area our concern is, of course, general in character and not limited to Title VII cases. The confusion and conflict in the circuits needs corrective action by this Court and the instant case provides a singularly appropriate vehicle for such action.

III. The Court Below in Disregard of This Court's Decision in *Duke Power* and in Disregard of the Express Mandate of Congress, Approved a Decree Which Grants Racial Preference and Establishes Racial Quotas.

Heeding Mr. Justice Frankfurter's tongue-in-cheek comment [". . . where the legislative history is doubtful, go to the statute"][38] we have collated the text of the legislative history relevant to the issues at hand, *infra*, pp. A-14–A-27, A-30–A-31. No one can read this legislative history and have any doubts as to Congressional intent. The Senate floor managers of the bill put it this way:

> "There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance . . . would involve a violation of Title VII . . ." (*infra*, p. A-19).

Before the Act was passed the Attorney General was of the same view:

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[38] **Greenwood v. United States**, 350 U.S. 366, 374 (1956).

> "Finally, it has been asserted Title VII would impose a requirement for 'racial balance.' This is incorrect. There is no provision, either in Title VII or in any other part of this bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance. No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites, Jews to gentiles, Italians to English, or women to men. The same is true of labor organizations. On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of Title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What Title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all" (*infra*, pp. A-25–A-26).

However, opponents of the bill persisted in their contention that racial quotas or preferences would be given if the bill were passed. It was for this very reason that Section 703(j) was added—i.e., to make it crystal clear that this would not happen (110 Con.Rec. 12723, Sen. Humphrey, *infra*, p. A-31). Given this history and the express language of Section 703(j) (*infra*, pp. A-2–A-3) it is inconceivable that a court would grant racial preferences or establish racial quotas. Yet the court below did just that.

Under the trial court's order approved by the court below the Petitioner JATC's are directed to select "to the extent there are blacks on the [waiting] list of qualified apprentice applicants, a sufficient number of blacks so as to insure a minimum participation by blacks . . . of 30

per cent of each class, of seven new apprentices per respective JATC per year, whichever is greater" (*infra*, p. A-53). Not satisfied with a 30% quota for the regular apprenticeship program, the trial court then ordered the establishment of a "special" apprenticeship program for blacks who did not meet the regular apprenticeship standards and do "not meet journeymen standards" (*infra*, p. A-54). And to cap it off, the trial court then provided that "Special apprentices [i.e., unqualified Negroes], if any are unemployed, shall be dispatched [on the basis of one special apprentice for] every tenth journeyman dispatched" (*infra*, p. A-67). Moreover, in the case of each of the Petitioner unions the trial court decreed that any statement on a Negro's referral application of referral is presumptively true (*infra*, pp. A-38, A-41, A-44, A-47). Other applicants for referral must provide proof of their experience or qualifications. Negro applicants for referral must be dispatched if requested by name—regardless of their position on the out-of-work list, even though Caucasions, or for that matter other minorities do not have the same right (*infra*, pp. A-38–A-39, A-41, A-44, A-47). Though strenuously challenged below, all of the foregoing provisions of the order were approved by the courts below.

The provisions of the order just cited are in direct conflict with Section 703(j), they do violence of the intent of Congress and fly in the face of this Court's decision in **Griggs v. Duke Power Co.**, ... U.S. ..., 3 FEP Cases 175, 177 (1971):

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference

for any group, minority or majority, is precisely and only what Congress has proscribed."

Other appellate courts, with or without the benefit of **Griggs**, read the Act as did this Court,[39] however, the court below ignored the language of the Act, its history and this Court's decision in **Griggs** when it approved the trial court's decree.

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[39] E.g., **United States v. Bethlehem Steel**, ... F.2d ..., ..., 3 FEP Cases 589, 596, 599 (2nd Cir. 1971); **Robinson v. Lorillard Corp.**, ... F.2d ..., ..., 3 FEP Cases 653, 655 (4th Cir. 1971); **Papermakers Local 189 (Crown Zellerbach Corp.)**, 416 F.2d 980, 994-995 (5th Cir. 1969), **cert. denied** 397 U.S. 919 (1970).

CONCLUSION

Given the flood of cases which have already reached the appellate level, the disregard by the appellate courts of the plain meaning of Title VII, and the confusion among the courts concerning their role in cases of this sort, it is imperative that this Court act. For the foregoing reasons this petition should be granted.

Respectfully submitted

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APPENDIX A

The Civil Rights Act of 1964 provides in pertinent sections:

"§2000e—2.

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

* * * * * * * *

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national

origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

"§2000e—4.

(a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party, who shall be appointed by the President by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years, beginning from July 2, 1964, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and shall appoint, in accordance with the civil service laws, such officers, agents, attorneys, and employees as it deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the Classification Act of 1949, as amended. The Vice Chairman shall act as Chairman in the absence or disability of the Chairman or in the event of a vacancy in that office.

(b) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(c) The Commission shall have an official seal which shall be judicially noticed.

(d) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendation and such recommendations for further legislation as may appear desirable.

(e) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

(f) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder.

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;

(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 2000e—5 of this title, or for the institution of a civil action by the Attorney General under section 2000e—6 of this title, and to advise, consult, and assist the Attorney General on such matters.

(g) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court.

(h) The Commission shall, in any, of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 118i of Title 5, notwithstanding any exemption contained in such section."

"§2000e—5.

(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of

such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a state or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time

such statement is sent by registered mail to the appropriate State or local authority.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials, and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to

not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For pur-

poses of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e —3(a) of this title.

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e) of this section, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under subsection (e) of this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

"§2000e—6.

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opin-

ion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited."

Section 50 of the Apprenticeship Act of 1937 provides (29 U.S.C., Sec. 50):

"The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare in accordance with section 17 of Title 20."

The Business Records Statute (28 U.S.C., Sec. 1732) provides:

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representa-

tion or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence."

Section 208 of the Packers and Stockyards Act provides (7 U.S.C., Sec. 208):

"It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful."

APPENDIX B

Pages A-14—A-27, *infra*, of this Appendix consist of excerpts from the "Legislative History of Titles VII and XI of the Civil Rights Act of 1964" prepared by the United States Equal Employment Opportunity Commission and printed by the United States Government Printing Office. Pages A-28—A-31, *infra*, of this Appendix consist of excerpts from the Congressional Record not found in the legislative history compiled by the EEOC.

A. Excerpts From the Legislative History Compiled by the EEOC

"3001. Part IV—Congressional Debate on Titles VII and XI

Introduction

"An important part of the legislative history of any statute is the congressional debate that preceded its adoption. Through a combination of extraordinary circumstances, however, the congressional debate that preceded the adoption of the Civil Rights Act of 1964, and particularly the Title VII equal employment opportunity provisions, assumed an almost overriding importance.

"The Title VII provisions that were adopted by the House and that were the subject of extensive discussion in the report of the House Judiciary Committee were modified substantially in the substitute measure adopted in the Senate. The substitute bill did not go through the usual committee procedure. Instead, it was hammered out in informal bipartisan conferences, with Majority Leader Mansfield (D., Mont.), Minority Leader Dirksen (R., Ill.), and Senators Humphrey (D., Minn.) and Kuchel (R., Calif.) as the principals.

"As a result, there was no committee report on the Senate bill. Moreover, since the House then voted to accept the Senate bill without change, there was no Senate-House conference report.

"With these usual guides to the legislative intent missing, the best available explanations of the intent behind the changes made by the Senate in the House bill are statements made at the opening of the Senate debate by Senators Dirksen (R.,Ill.) and Humphrey (D.,Minn.). Dirksen preceded his explanation by an annotated text of the House bill showing the changes made by the Senate substitute.

"Also valuable in this respect are a comparative analysis of the two bills prepared by Congressman McCulloch (R.,Ohio) and introduced into the **Congressional Record** by Senator Dirksen (R.,Ill.) and a statement by Congressman Celler (D.,N.Y.), floor manager for the bill in the House, explaining the changes made by the Senate in the House bill.

"So Part IV of this legislative history begins with the pertinent excerpts from the Dirksen-Humphrey statements, the comparative analysis of the Senate and House bills, and the Celler statement on the changes made by the Senate in the House bill. These are followed by three other statements of a general nature: (1) a bill introduced by Senators Clark (D.,Pa.) and Case (R.,N.J.) as a substitute for both the House bill and the Dirksen amendment; (2) an interpretative memorandum on Title VII submitted jointly by Senators Clark (D.,Pa.) and Case (R., N.J.,), as Senate floor managers of the House-approved bill; and (3) a response submitted by Senator Clark (D., Pa.) to a memorandum by Senator Dirksen (R.,Ill.) asking questions relating to Title VII.

"3002.

"Following these major statements are excerpts from the congressional debate organized by subject matter. There are six principal sections: (1) Comparisons of Bills; (2) Constitutionality, (3) Coverage and Exemptions, (4) Discrimination Forbidden, (5) Enforcement and Administration, and (6) Title XI Provisions. But the debate in each section is organized under numerous subheadings.

"Preceding each excerpt is an editors' note explaining the relevance of the debate and a reference to the date and page number of the bound **Congressional Record** where the excerpt appears. Three asterisks (* * *) are used to indicate the omission of extraneous text."

"3003. A. Major Congressional Statements.

Humphrey Explanation of Titles VII and XI

"Editor's Note: **On June 4, 1964, Senator Humphrey (D.,Minn.) presented to the Senate a detailed explanation of the changes made in the House bill (H.R. 7152) by Senate substitute amendment No. 656, the compromise worked out in a series of conferences among Senate leaders and Justice Department officials. The parts of the explanation relating to Titles VII and XI follow.**

"Mr. Humphrey. * * *

"3005.

"Ninth. A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to

state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning."

"3009. Clark Response to Questions on Title VII

"Editor's Note: **Early in the Senate debate on the House-approved bill (H.R. 7152), Senator Dirksen (R.,Ill.) submitted a memorandum questioning a number of provisions in the bill. As one of the Senate floor managers of the bill, Senator Clark (D.,Pa.) prepared answers to the questions relating to Title VII. The text of the Clark response follows, except for questions and answers dealing with provisions that later were changed or deleted by the Senate substitute.**

"3013. Mr. Clark. * * *

"Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?

"Answer: Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race.

"Question. If an employer is directed to abolish his employment list because of discrimination what happens to seniority?

"Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists.

• • •

"Objection: Under the bill, employers will no longer be able to hire or promote on the basis of merit and performance.

"Answer: Nothing in the bill will interfere with merit, hiring, or merit promotion. The bill simply eliminates consideration of color from the decision to hire or promote.

"Objection: If the employer discharges a Negro, he must prove that the dismissal has nothing to do with race. When an employer promotes or increases the pay of a white employee, he must show that he was not biased against the Negro worker who was not promoted.

"Answer: The Commission must prove by a preponderance that the discharge or other personnel action was because of race.

"Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.

"Answer: Quotas are themselves discriminatory."

"3039. Interpretative Memorandum on Title VII

"Editor's Note: On April 8, 1964, Senators Clark (D., Pa.) and Case (R.,N.J.) introduced into the Congressional Record an interpretative memorandum on Title VII of the House-approved H.R. 7152, for which they were floor managers in the Senate. The text of the memorandum, with portions dealing with provisions later changed in the Senate substitute deleted, follows.

"Senate 4-8-64 pp. 7212-7215

"3040. • • •

"With the exception noted above [relating to communists], therefore, section 704 prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simply has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.

"There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against.

• • •

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, per-

mitted--to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination)."

"3061. B. Congressional Debate by Subject Matter
Comparison of Bills

"Editor's Note: **Senator Holland (D.,Fla.) explained the jury-trial and double-jeopardy amendments incorporated by the Senate in the House-passed bill and discussed change made by the Dirksen-Mansfield substitute.**

"Mr. Holland. * * *

"3062.

"Section 704(j) expressly provides that the title is not to be interpreted to require anyone to give preferential treatment to any individual or group because of race, color, religion, sex, or national origin, or to correct a racial or religious, and so forth, imbalance between the number of persons of a particular race, and so forth, employed by an employer and the total number of persons of that race, religion, and so forth, living in a particular community, State, or other area."

"3092.

"Editor's Note: **During the debate in the Senate, Senator Clark (D.,Pa.) undertook to rebut the charge that Title VII was intended to rob all Americans of important rights for the benefit of one segment of the population.**

"Mr. Clark. * * *

"I was rather startled to hear my good friend from North Carolina make the statement, which I believe I took down accurately, that this was a title to rob all Americans of important rights for the benefit of one segment of the population.

"Mr. President, this title would not deprive anyone of any rights. All it does is to say that no American, individual, labor union, or corporation, has the right to deny any other American the very basic civil right of equal job opportunity.

"The bill does not make anyone higher than anyone else. It establishes no quotas. It leaves an employer free to select whomever he wishes to employ. It enables a labor union to admit anyone it wishes to take in. It tells an employment agency that it can get a job for anyone for whom it wishes to get a job."

"3187. Discrimination Forbidden: Quota Hiring

"Editor's Note: Senator Allott (R., Colo.) introduced an amendment making clear that Congress, in enacting Title VII, did not intend to impose a quota system on employers and unions to force them to overcome racial imbalance. The sense of his amendment was incorporated in the Dirksen-Mansfield compromise and appears in Section 703-(j) of the Act.

"Mr. Allott. * * *

"The amendment (No. 568) is as follows:

"On page 42 between lines 16 and 17 insert the following:

'(f) The court shall not find, in any civil action brought under this title, that the respondent has engaged in or is engaging in an unlawful employment practice charged in the complaint solely on the basis of evidence that an imbalance exists with respect to the total number of percentage of persons of any race, color, religion, sex, or

national origin employed by any employer, referred or classified for employment by any employment agency, admitted to membership, or [p. 3188] classified, by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, without supporting evidence of another nature that the respondent has engaged in or is engaging in such practice.' "

"3242.

"Editor's Note: **In the course of the debate, Senator Hill (D., Ala.) charged that Title VII would undermine seniority rights, deny unions their representation rights under the Taft Hartley Act and the Railway Labor Act, and would impose the requirement of racial balance. In rebuttal to these charges, Senator Clark (D., Pa.) placed in the record a letter from Walter Reuther, president of the Auto Workers, and a statement from the Department of Justice.**

"Senate 2-8-64 pp. 7205-7207

• • •

"3244-3245.

"Mr. Clark. I have also had prepared by the Department of Justice a summary statement in rebuttal to the argument made by the Senator from Alabama [Mr. Hill] to the effect that Title VII would undermine the vested rights of seniority; that it would deny to unions their representation rights under the National Labor Relations Act and the Railway Labor Act; that the operation of Title VI would in some way affect adversely the rights of organized labor; and that Title VII would impose the requirement of racial balance.

"I submit that those assertions of the able senior Senator from Alabama are untenable.

"Mr. President, I ask unanimous consent that the rebuttal to the argument prepared at my request by the Departznent of Justice be printed in full in the Record at this point in my remaarks.

"There being no objection, the statement was ordered to be printed in the Record as follows:

"Reply to Arguments Made by Senator Hill

"First, it has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII. Employers and labor organizations would simply be under a duty not

to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

"Second, it has been asserted that it would be possible to deny unions their representation rights under the National Labor Relations Act and the Railway Labor Act. This is not correct. Nothing in Title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act. The procedures set up in Title VII are the exclusive means of relief against those practices of discrimination which are forbidden as unlawful employment practices by sections 704 and 705. Of course, Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction. To what extent racial discrimination is covered by the NLRA is not entirely clear. I understand that the National Labor Relations Board has presently under consideration a case involving the duties of a labor organization with respect to discrimination because of race. At any rate, Title VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now. On the other hand, where the procedures of Title VII are invoked, the remedies available are invoked, the remedies available are those set out in section 707(e), injunctive relief against continued discrimination, plus appropriate affirmative action including the payment of backpay. No court order issued under Title VII could affect the status of a labor organization under the National Labor Relations Act or the Railway

Labor Act, or deny to any union the benefits to which it is entitled under those statutes.

"Third, it has been asserted that the operation of Title VI will in some way affect the rights of organized labor. This is incorrect. Title VI deals with programs of Federal financial assistance. I know of no financial assistance rendered to labor organizations under the National Labor Relations Act or the Railway Labor Act, the Davis-Bacon Act, or the Walsh-Healey Act. These organizations benefit, as do all American workers, from the beneficent policies of these statutes, but there is no flow of cash, goods or credit from the Federal Government to these organizations and it is to such assistance that Title VI is directed. Title VI would no more authorize the suspension of a union's status as a collective bargaining agent because of discrimination than it would authorize the Bureau of Customs to stop collecting duty on goods competing with those produced by an employer who discriminates. There is simply no such authority anywhere in the bill.

"Finally, it has been asserted Title VII would impose a requirement for 'racial balance.' This is incorrect. There is no provision, either in Title VII or in any other part of this bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance. No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites, Jews to gentiles, Italians to English, or women to men. The same is true of labor organizations. On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of Title VII because it would involve a failure or refusal to hire some individual be-

cause of his race, color, religion, sex, or national origin. What Title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all.

"Mr. Clark: Mr. President, it is clear that the bill would not affect seniority at all. It would not affect the present operation of any part of the National Labor Relations Act or rights under existing labor laws. The suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate.

• • •

"The businessman's personnel problems have not swollen to mammoth proportions, nor has he been forced to spend the best part of his time in court as an alternative to hiring every minority group member who presents himself for employment. His freedom is not restricted except for his freedom to be biased in his personnel policies. He is not hounded unjustly, as evidenced by the fact that discrimination actually has been found in about half the cases investigated."

"3259.

"Editor's Note: **Senator Humphrey (D., Minn.) offered the following explanation of enforcement procedures under Title VII.**

"Mr. Humphrey: • • •

"The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices. The title does not provide for the

reinstatement or employment of a person, with or without back pay, if he was fired or refused employment or promotion for any reason other than discrimination prohibited by the title. The title contains no provisions which would jeopardize union seniority systems, nor would anything in the title permit the Government to control the internal affairs of employers or labor unions.

"3283. Enforcement and Administration:

EEOC—Enforcement Powers, Procedures

"Editor's Note: In the following statement, Congressman Celler (D., N.Y.) sought to refute charges that the EEOC would have the power to prevent a business from employing and promoting the people it wished and that EEOC would have authority to rectify existing 'racial or religious imbalance.'

"Mr. Celler: * * *

"3284.

"It has been asserted also that the bill would destroy worker seniority systems and employee rights vis-a-vis the union and the employer. This again is wrong. The bill would do no more than prevent a union, as it would prevent employers, from discriminating against or in favor of workers because of their race, religion, or national origin.

"It is likewise not true that the Equal Employment Opportunity Commission would have power to rectify existing 'racial or religious imbalance' in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. Only actual discrimination could be stopped. And there is, of course, no provision whatever for depriving unions of the rights and benefits under existing law."

B. Excerpts From the Congressional Record Relating to the Phrase "Pattern or Practice" of Discrimination:

110 Con.Rec. 12722—Sen. Humphrey:

"... in significant cases of discrimination in employment the United States would have adequate authority to initiate legal action."

110 Con.Rec. 14239—Sen. Humphrey:

"It is meant to exclude action in sporadic instances of violation of rights which will be left to correction by individual complaints under other sections of these titles. It would be clear that an establishment or employer that consistently or avowedly denies rights under these titles is engaged in a 'pattern or practice of resistance.'"

110 Con.Rec. 14270—Sen Humphrey:

"Such a pattern or practice would be present only when the denial of rights consists of something more than an isolated sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice . . . if a company repeatedly and regularly engaged in acts prohibited by the statute. * * * The point is that single, insignificant, isolated acts of discrimination . . . would not justify a finding of a pattern or practice. . . ."

110 Con.Rec. 15895—Rep. Celler:

"A pattern or practice of resistance would exist, for example . . . where a single company regularly refused to treat Negroes without discrimination. There would be no authority for the Attorney General to sue a single firm for an isolated or sporadic act of discrimination."

During hearings on the Voting Rights Act of 1957, the following colloquy between Senator McClellan and Deputy

Attorney General Walsh over the meaning of the words "pattern" and "practice" indicates that, at that time at least, the Attorney General's office was familiar with the usual meaning of the words (H.R. 8601, 86th Cong., 2nd Sess. 68):

> "Sen. McClellan: Now, what constitutes a pattern?
>
> "Mr. Walsh: A pattern of discrimination would be discrimination that was widespread beyond an individual case. It would be the burden to be carried by an Attorney General which would be to prove this was the usual rather than the unusual situation.
>
> "Sen. McClellan: What constitutes a practice?
>
> "Mr. Walsh: Practice would be very much the same thing. Not only was it usual but it has been indulged—I mean, the words have their generic meaning; there is no word of art involved.
>
> "Sen. McClellan: To establish a practice there [sic] wouldn't there have to be repeated acts?
>
> "Mr. Walsh: I think that would be the general sense of it; yes, sir."

C. Excerpts from the Congressional Record Relating to Established Seniority, Racial References and Racial Quotas:

110 Con.Rec. 1518—Rep. Celler:

> "Even then [after trial], the Court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end to discrimination."

110 Con.Rec. 1600—Rep. Minish:

> "Under Title VII . . . no quota system will be set up . . .."

110 Con.Rec. 2558—Rep. Goodell:

"There is nothing here as a matter of legislative history that would require racial balancing. * * * There is no quota involved."

110 Con.Rec. 12617—Sen. Muskie:

"Title VII seeks to afford all American equal opportunity in employment without discrimination. * * * Not 'racial balance.' Only equal opportunity."

110 Con.Rec. 5808—Sen. Keating:

". . . no quota system is provided in the bill."

110 Con.Rec. 6549—Sen. Humphrey:

"Contrary to the allegations of some opponents to this title, there is nothing in it that will give any power . . . to any court to require hiring . . . of employees in order to meet a racial 'quota' or to achieve a certain racial balance."

See also 110 Con.Rec. 5092, 5423 and 13088 where Senator Humphrey makes substantially similar statements.

110 Con.Rec. 7218—Sen. Clark:

"Quotas are themselves discriminatory."

110 Con.Rec. 8921—Sen. Williams:

". . . to hire Negro solely because he is a Negro is discrimination . . ."

110 Con.Rec. 9113—Sen. Keating:

"For . . . a court to order preferential treatment to a particular minority group would clearly be inconsistent with the guarantees of the Constitution."

110 Con.Rec. 9601—Sen. Fulbright:

After pointing out that no preferential treatment is contemplated, Senator Fulbright observed: "If discrimination is difficult to prove, it is doubly difficult to disprove."

110 Con.Rec. 11848—Sen. Humphrey:

"In fact, the title would prohibit preferential treatment for any . . . member of any minority group . . ."

110 Con.Rec. 12723—Sen. Humphrey:

"The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly."

110 Con.Rec. 13080—Sen. Clark:

"The bill * * * establishes no quotas."

110 Con.Rec. 14465—Bipartisan Civil Rights Newsletter No. 28 submitted by Sen. Hart:

"Under Title VII, not even a court, much less the commission, could order racial quotas . . ."

APPENDIX C

United States of America

vs

Local 86 Iron Workers
Local 99 Sheet Metal
Local 46 Electricians
Local 32 Plumbers & Fitters
Iron Workers J A C
Sheet Metal J A C
Plumbers & Fitters J A C

United States District Court, Western District of Washington, Northern Division

United States of America, Plaintiff, v. Local No. 86, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, et al., Defendants.	Civil Action No. 8618.

JUDGMENT AND DECREE NO. 1 REGARDING THE STANDARDS AND PROCEDURES RELATING TO UNION REFERRAL AND MEMBERSHIP

(June 16, 1970)

1. Defendant local unions, their officers, agents, employees, successors and all persons in active concert or participation with them in the administration of defendant local unions shall:

a. Not discriminate, with respect to acquisition or retention of membership in such local unions or with respect to referral for employment, against any person because of his race or color;

b. Not cause, authorize, encourage or financially support any refusal to work by their members, tacitly or otherwise, where the purpose of such refusal to work is to obtain an objective prohibited by the terms and objectives of this Order;

c. Administer their affairs so as to provide opportunities for membership and employment to blacks which are equal to those provided whites.

Records and Record Keeping:

2. After July 15, 1970, Defendant Locals shall require all persons who enter their offices seeking employment to sign a serially numbered bound register, giving their name, race, the date of registration, the classification of the various skills which they possess (for example for Local 86: structural, rodman, welder), and union affiliation (if any). Defendant Locals shall require all persons who enter their offices seeking employment to complete and file with the union an application for referral. In each case, such application shall be serially numbered and contain at least the name, address, telephone number, age, race, union affiliation (if any) and summary and explanation of the applicant's experience in the particular union's trade or any related trade. The application shall then become a permanent part of the applicant's file, and shall be updated, if necessary, upon each subsequent request for referral by the applicant. Defendant Locals shall place on their out of work lists and refer to work only those persons who have on file such an application and have signed the referral register.

3. After July 15, 1970, Defendant Locals' application forms for membership shall contain at least the following information: name, address, race, date of application, classification of each applicant for membership, and the action taken with respect to him. They shall maintain records containing all applications for membership, copies of all notices sent to applicants, copies of any replies received from applicants, and all other material pertaining to applicants for membership.

4. Beginning October 1, 1970, and every three months thereafter, Defendant Locals shall transmit to the Plaintiff the following records:

a. copies of all referral applications filed within the reporting period;

b. copies of all hiring hall dispatch slips issued during the reporting period, said dispatch slips shall reflect the race of the individual and the priority group from which he was referred;

c. copies of all health and welfare reports received during the reporting period;

d. copies of termination slips received from all employers during the reporting period;

e. in the case of a black applicant who is not placed on the out of work list or who is not referred for work, Defendant Locals shall report his name, address, telephone number and reason why he was not placed on the out of work list or referred to work;

f. copies of membership applications filed during the reporting period and a list of the names of all new members initiated during the reporting period;

g. copies of the serially numbered registers provided for in this Order, reflecting the information therein contained for the preceding three month period.

Plaintiff shall review this data every six months and submit to the Court and the interested local a statistical summary thereof with such analysis and comments as may be relevant to the terms and objectives of this Order.

5. Each Defendant Local shall maintain a serially numbered bound register—called the Contractors' Register—of all requests by contractors for each trade classification of employees. The register shall contain the name of the contractor, the date and time of the request, the name of any employee specifically requested, the number of employees requested, the special skills (if any) required, and the names, race, union affiliation and classification (if any), and dates and times of referral of those persons sent to fill the request.

6. All records relating to applications for membership —including membership examinations, if given—and the referral of applicants to work shall be maintained and made available for inspection and copying by the Plaintiff at reasonable intervals during regular business hours or at other mutually convenient times without further order of this Court.

Dissemination of Information:

7. Defendant Locals shall prepare a brief written statement describing the operation of their referral systems and their membership requirements for blacks. The various employment opportunities also shall be briefly described and the current rate of pay set forth. The statement shall also indicate that union membership is not a requirement of initial referral. A copy of the statement shall be furnished to the Plaintiff and each black applicant for employment.

8. Once a month for six months following entry of this Order, and quarterly thereafter, Defendant Locals shall

place advertisements in newspapers identified with serving the black community, describing the work opportunities available through Defendant Locals, the procedures for obtaining such opportunities, and stating that such opportunities are offered on a nondiscriminatory basis. Copies of such advertisements along with date of publication and the identity of the newspaper shall be furnished plaintiff United States.

9. Before July 15, 1970, Defendant Locals shall forward to the organizations listed in Exhibit A of this Order a copy of the statement required under paragraph 7 hereof, a copy of their constitutions and bylaws, a copy of their current collective bargaining agreements and a copy of this Order. Further notice shall be sent these organizations whenever necessary in order to keep the information available to these organizations current. Information shall also be sent to these or any other organizations upon request by the organization.

10. Defendant Locals shall continue to participate in and financially support the Seattle Building Trades Council "Outreach Program." In the event the United States Department of Labor funds the aforementioned "Outreach Program" the Defendant Locals shall participate in good faith in the implementation of such program.

Retention of Jurisdiction:

11. The Court shall retain jurisdiction of this case for such further relief as may be necessary or appropriate to further effectuate equal employment opportunities. At any time after June 30, 1973, Defendant Locals or Plaintiff may move this Court, on due notice, for termination of this Order or such modification as may be warranted under the circumstances then existing.

Costs:

12. Since the application of this Order is substantially prospective, the matter of costs is reserved and may be brought on with such motions as might be made under paragraph 11, above, or at such other time as may be considered appropriate.

PROVISIONS RELATING ONLY TO LOCAL 86

Membership Application Procedures:

13. Local 86 shall offer journeyman membership in the appropriate union membership classification to blacks possessing the following qualifications, union constitutions and bylaws notwithstanding:

a. **Welders**—700 hours of construction welding experience and possession of a City of Seattle Welders Certificate and payment of the standard initiation fee.

b. **Rodmen**—700 hours of rod work experience and payment of the standard initiation fee.

c. **Structural Men**—700 hours of structural ironwork experience and payment of the standard initiation fee.

The "standard initiation fee" which may be charged as to blacks shall be no higher than that amount which is the average between the initiation fee charged upon July 2, 1965 and the initiation fee charged upon the effective date of this Order. Payment shall be on the most favorable terms afforded by the local within the past five years.

14. Black applicants for membership in Local 86 shall not be required to provide names of union members who will vouch for them, nor shall it be necessary that they pass any examination as a prerequisite of membership.

Journeyman Referral Procedures:

15. If Local 86 continues to use priority groupings in the operation of its hiring hall, black applicants for referral, irrespective of membership status, shall be referred for employment by Local 86 within the appropriate priority group warranted by the applicant's experience. "Experience" shall include experience as an employee of a nonunion shop, self-employment in any aspect of the trade, or any other employment reasonably related to the ironwork trade, including experience gained in the Armed Services.

16. Persons shall be referred out of the first priority group in chronological order of their date of placement on that list, and then, after the names of the first priority group are exhausted, in the same manner out of the second priority group and so forth through each priority group. If Local 86 chooses not to retain a priority grouping system, all referrals shall then be made on a first-in-first-out basis. In any event Local 86 shall inform Plaintiff within ten days of any referral system which it adopts or informally employs that varies from the one instituted by Local 86 on March 1, 1970.

17. The union shall not require an examination or previous experience under the collective bargaining agreement as prerequisites to the placement of a black applicant's name on the out of work list or his referral to work. An applicant's own statement on an application for referral shall be sufficient evidence as to previous experience. The union shall retain the right to verify any relevant statements made.

18. Because black journeymen generally have been denied the opportunity to acquire prior work experience with contractors and apart from whatever other right contractors may currently have to call a person out of

order, blacks may be called for work by a contractor irrespective of their place on the out of work list or prior experience with a particular contractor.

Specific Relief:

19. Local 86 shall not later than July 15, 1970, contact by certified mail the individuals listed in Exhibit B and offer them immediate referral in response to any of the next three contractor requests for employees following their indication to the union that they desire referral. Local 86 shall also explain the membership requirements as set out in paragraphs 13 and 14 above.

20. Local 86 shall transmit to the United States copies of all letters sent pursuant to paragraph 19 within three days after sending same and, as soon as reasonably possible, a report detailing the response of the individuals contacted.

PROVISIONS RELATING ONLY TO LOCAL 32

Membership Application Procedures:

21. Local 32 shall offer journeyman membership in the appropriate building trades membership classification to blacks who meet the following requirements:

a. Three years of experience in the plumbing and pipe fitting trade. "Experience" includes experience as an employee of a nonunion shop, self-employment as a plumbing, steam fitting or refrigeration contractor, employment as a marine pipe fitter or pipe welder, and any other employment reasonably related to plumbing, steam fitting, refrigeration or pipe welding construction work, including experience gained in the Armed Services.

b. Submission of letters from past employers of the applicant or persons having knowledge of the applicant's

experience, showing at least three years' experience in the trade.

c. Successful completion of the journeyman examination offered by Local 32 for the classification for which the applicant applied.

d. Payment of the standard initiation fee for journeyman membership.

As to blacks, the standard initiation fee which may be charged shall be no higher than that amount which is the average between the initiation fee charged on July 2, 1965 and the initiation fee charged upon the effective date of this Order. Payment shall be on the most favorable terms afforded by the local in the past five years.

22. Local 32 shall offer examinations for direct journeyman membership at least once every four months whenever there are applicants for journeyman membership. Each applicant shall be given at least one month's written notice of the date and place of examination, the nature and general description of its content and/or copies of last two prior written examinations, and the names of any texts or other material which might be particularly helpful in preparing for the examination. Any examination given shall be no more stringent than those given by Local 32 in the past five years.

23. Local 32 shall not alter or change the employment or referral rights of a black applicant because of such applicant's failure to achieve a passing grade on the membership examination.

Journeyman Referral Procedures:

24. All blacks who have a minimum of two years experience in the plumbing and pipe fitting trade shall, depending upon the general occupational residence requirements of the union, be assigned to the appropriate priority

group and be referred on that basis. Eligibility for membership shall not be a prerequisite for referral. "Experience" shall include experience as an employee of a nonunion shop, self-employment as a plumbing, steam fitting or refrigeration contractor, employment as a marine pipe fitter or pipe welder, or any other employment reasonably related to plumbing, steam fitting, refrigeration or pipe welding construction work, including experience gained in the Armed Services. An applicant's own statement on an application for referral shall be sufficient evidence as to previous experience. The union shall retain the right to verify any relevant statements made.

25. Persons shall be referred out of the "A" list in chronological order of their date of placement on that list and then, after names on the "A" list are exhausted, in the same manner the "B" list, and finally the "C" list. Persons may be referred out irrespective of their place on the out of work list in response to a contractor's request for such a person provided he has worked for that contractor within the preceding 90 days. Because black journeymen have been denied the opportunity to acquire prior familiarity and experience with contractors, the proviso contained in the preceding sentence shall not apply to black journeymen. Contractors may also request any individual by name to fill a foreman's job or other job requiring specialized skills.

Specific Relief:

26. Local 32 shall not later than July 15, 1970, contact by certified mail the individuals listed in Exhibit C and those black members and applicants working in non-construction classifications and offer them immediate construction referral in response to any of the next three contractor requests for employees following their indication to the union that they desire construction work referral. Local 32 shall also explain its membership re-

quirements to those persons not already members and offer such individuals the opportunity to apply for admission to membership.

27. Local 32 shall contact Lionel Hampton and offer him immediate referral as a marine pipe fitter. His application for membership shall be reinstated should he so desire.

28. Local 32 shall transmit to the United States copies of all letters sent pursuant to paragraph 26 and 27 within three days of sending same and a report, as soon as reasonably possible, detailing the response of the individuals contacted and whether or not they were referred to work, and if so, when and to which contractor.

PROVISIONS RELATING ONLY TO SHEET METAL WORKERS 99

Membership Application Procedures:

29. Local 99 may require of blacks applying for building trades journeyman membership requirements no more stringent than the following:

a. two years of experience in the sheet metal trade, or in another trade utilizing skills applicable to the sheet metal trade, including experience as an employee of a union or nonunion shop; self-employment in the sheet metal trade; employment as a marine sheet metal worker; or other employment reasonably related to the sheet metal trade, including experience gained in the Armed Services;

b. successful completion of the journeyman examination offered by Local 99 for the classification for which the applicant applied; and

c. payment of the standard initiation fee for journeyman membership.

As to blacks, the "standard initiation fee" which may be charged shall be no higher than that amount which is

the average between the initiation fee charged upon July 2, 1965 and the initiation fee charged upon the effective date of this Order. Payment shall be on the most favorable terms afforded by the local in the past five years.

30. Local 99 shall offer examinations for direct journeyman membership at least once every four months at Seattle Community College whenever there are applicants for journeyman membership. Each applicant shall be given at least one month's written notice of the date and place of examination, the nature and general description of its contents and/or copies of the last two thereof, and the names of any texts or other materials which would be particularly helpful in preparing for the examination. Any examination given shall be no more stringent than those given by Local 99 in the past five years, and the accepted passing score for blacks shall be no higher than accepted passing scores for whites in the past five years.

31. Local 99 shall not alter or change the employment or referral rights of a black applicant because of such individual's failure to achieve a passing grade on the membership examination.

Union Referral Procedures:

32. Local 99 shall refer all applicants for employment on a first-in first-out basis. Applicants shall be referred in the order that they appear in the referral register and they shall not be allowed to solicit work on their own from union contractors. This system shall be followed in all cases with the following exceptions:

a. a contractor may call by name a person to fill a foreman's position;

b. a contractor may request a person with special skills, and Local 99 will refer the person with the greatest seniority on the referral register possessing such a skill;

c. a contractor may request a man on the referral register provided that the individual has worked for that contractor within the previous 90 day period. Because black applicants have been denied the opportunity to acquire previous experience with contractors, the proviso contained in sentence one of this subsection shall not apply to black applicants.

d. Each applicant registered on the out of work list shall be required to confirm his continued availability in writing once each month. After two successive months in which an applicant fails to do so his name shall be removed from the list. Applicants who decline three or more referrals (accident, illness, vacation, or bona fide reason otherwise excepted) in a calendar month shall drop to the bottom of the list. An applicant who has been dispatched will be dropped from the list on the sixth working day following his dispatch.

33. All black applicants for construction referral who have a minimum of two years' experience in the sheet metal trade shall have their names placed on the out of work list. "Experience" in the sheet metal trade shall include experience as an employee of a union or nonunion shop, self-employment as a sheet metal contractor, employment as a marine sheet metal worker, or other employment reasonably related to sheet metal work, including experience gained while in the Armed Services. Local 99 shall not require passage of an examination or previous experience under the collective bargaining agreement as prerequisites to the placement of a black applicant's name on the out of work list or his referral to work. An applicant's own statement on an application for referral shall be sufficient evidence as to previous experience. The union shall retain the right to verify any relevant statements made.

Specific Relief:

34. Local 99 shall not later than July 15, 1970 contact by certified mail the individuals listed in Exhibit D and those black members and applicants working in nonconstruction classifications and offer them immediate construction referral in response to any of the next three contractor requests for employees following their indication to the union that they desire construction referral. Local 99 shall also explain its membership requirements to such of these individuals who are not members and offer them the opportunity to apply for admission to membership in the building trades unit.

35. Local 99 shall transmit to the United States copies of all letters sent pursuant to paragraph 34 within three days of sending same and a report detailing the response of the individuals contacted as soon as reasonably possible and whether or not they were referred to work, and if so, when and to which contractor.

PROVISIONS RELATING ONLY TO ELECTRICAL WORKERS LOCAL 46

Membership Application Procedures:

36. Local 46 may require of blacks applying for journeyman wireman membership in the construction unit requirements no more stringent than the following, union constitutions and bylaws notwithstanding:

a. four years of experience in the electrical trade, including experience as an employee of a union or nonunion shop; self-employment as an electrical contractor; employment as a marine electrician; or other employment reasonably related to the electrical trade, including experience gained in the Armed Services;

b. successful completion of the journeyman wireman examination conducted by Local 46;

c. payment of the standard initiation fee for journeyman membership.

As to blacks, the "standard initiation fee" which may be charged shall be no higher than that amount which is the average between the initiation fee charged upon July 2, 1965 and the initiation fee charged upon the effective date of this Order. Payments shall be on the most favorable terms afforded by the Local in the past five years.

37. Local 46 shall offer examinations for direct journeyman membership at least once every four months whenever there are applicants for journeyman membership. Each applicant shall be given at least one month's written notice of the date and place of examination, the nature and general description of its contents and/or copies of the last two thereof, and the names of any texts or other materials which might be particularly helpful in preparing for the examination. Any examination given shall be no more stringent than those given by Local 46 in the past five years.

38. Local 46 shall not alter or change the employment or referral rights of a black applicant because of such individual's failure to achieve a passing grade on the membership examination.

Journeyman Referral Procedures:

39. Local 46 shall refer construction electricians to work in the order of priority established in its current collective bargaining agreement. However, the following modifications in the construction work referral system shall be made with regard to black applicants for construction referral:

a. All blacks who have a minimum of two years experience in the electrical trade and are residents within the geograhical area constituting the normal construction labor market shall have their names placed on the Group I out of work list. Blacks with less than two years' experience who are residents within the geographic area constituting the normal construction labor market shall be placed on the Group III out of work list.

b. "Experience" as used in paragraph 39a shall include electrical experience as an employee of a union or nonunion shop, self-employment as an electrician or electrical contractor, employment as a marine electrician, or other employment reasonably related to electrical work, including experience gained while in the Armed Services.

c. Local 46 shall not require of black applicants for referral the passage of an examination or previous experience under the collective bargaining agreement as prerequisites to having their name placed on either the Group I or Group III out of work list and being referred to work. In addition, Local 46 shall require no proof of such applicant's prior experience other than his own statement on an application for referral. The union shall retain, however, all rights to verify any relevant statements therein made.

40. Persons may be referred out irrespective of their positions on the out of work list under those conditions set forth in the current collective bargaining agreement; provided, however, that any requirements with respect to previous employment in the electrical trade shall not apply to blacks.

Special Relief:

41. Local 46 shall not later than July 15, 1970, contact by certified mail the individuals listed in Exhibit E and offer to place them in Group I for immediate construc-

tion referral. Should they so desire, such individuals shall be referred to work in response to any of the next three contractor requests for employees following their indication to the union that they desire construction work referral. Local 46 shall also explain requirements for journeyman wireman membership in the construction unit and shall offer such individuals the opportunity to join as members of Local 46.

42. Local 46 shall transmit to the United States copies of all letters sent pursuant to paragraph 41 within three days after sending same and shall report as soon as reasonably practical the response by the individuals named, including whether or not that were referred to work, and if so, when and to what contractor.

EFFECTIVE DATE

43. The provisions of this Order shall become effective July 15, 1970.

Dated this 16th day of June, 1970.

WILLIAM J. LINDBERG
United States District Judge

EXHIBIT A

1. Urban League
   Smith Tower
   MA 2-2322
2. Multi Services Center
   2319 South Jackson
3. Concentrated Employment Program
   1519—12th
4. Seattle Opportunities Industrialization Center
   2332 East Madison Street
   EA 4-8270
5. Central Area Motivation Program
   722—18th Avenue
   EA 3-2824
6. NAACP
   152½—20th Avenue
   EA 4-6600
7. City of Seattle Human Rights Department
   Seattle Municipal Building
   583-2754
8. Washington State Employment Security Department
   515 Thomas Street
   464-7600
9. Seattle Community College
   1718 Broadway
   587-5454
10. AMCO
    214 Columbia
    MA 2-5060

United States District Court
Western District of Washington
Northern Division

United States of America,
Plaintiff,
v.
Local No. 86, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, et al.,
Defendants.

Civil Action.
No. 8618.

JUDGMENT AND DECREE NO. 2 REGARDING STANDARDS AND PROCEDURES RELATING TO APPRENTICESHIP AND TRAINING

(Jun 16, 1970)

1. Defendant Joint Apprenticeship Committees, their officers, agents, employees, successors, and all persons in active concert or participation with them in the administration of the apprenticeship programs are permanently enjoined from discriminating against applicants for apprenticeship because of their race or color. All committee programs shall be conducted so as to provide employment opportunities to black applicants and participants which are equal to those provided white applicants and participants.

Dissemination of Information:

2. In order to apprise blacks residing within the geographical area served by the respective apprenticeship committees of the requirements and procedures for admission to the "regular" and "special" apprenticeship pro-

grams set out below, each committee shall prepare a brief summary of the requirements for admission and graduation of each program together with a brief description of the employment opportunities available to the apprentices and journeymen. Such statement shall be made available to all apprentice applicants. A copy of such statement, together with a copy of the applicable apprenticeship standards, shall be forwarded to the organizations listed on Exhibit A to this Order and to the vocational guidance counselors at Garfield, Franklin and Cleveland High Schools in Seattle. A copy of this statement or statements shall be furnished to the Plaintiff.

3. Once a month for six months following the entry of this Order, and quarterly thereafter, Defendant Apprenticeship Committees shall place advertisements in newspapers identified with serving the black community, describing the work opportunities available through the "regular" and "special" apprenticeship programs, the requirements and procedures for obtaining such opportunities, the beginning rate of pay for each program and the current journeyman scale, the names of organizations or persons from whom further information may be sought, and a statement that such opportunities are offered on a nondiscriminatory basis. Copies of such advertisements, along with the date of publication and the identity of the newspaper, shall be furnished to the Plaintiff.

4. Defendant Apprenticeship Committees shall also offer to participate in Career Day exercises and similar programs at Garfield, Franklin and Cleveland High Schools in Seattle, and shall contact the high school counselors and placement officers at these high schools as well as officials of the organizations listed in Exhibit A, and advise these persons of the nature of and the requirements for the "regular" apprenticeship programs. Each committee shall also furnish such high schools and organizations with apprentice application forms for the "regular"

apprenticeship program along with instructions that an applicant can complete it and mail it to the apprenticeship committee. On receipt of a mailed application form, an apprenticeship committee shall promptly send to the applicant (by return mail if practicable) written acknowledgment and instructions as to what further steps the applicant must take to complete his application.

Qualification Requirements for Regular Apprenticeship Programs:

5. The Plumbers and Pipe Fitters J.A.T.C. and the Sheet Metal J.A.T.C. shall maintain a list of qualified apprentice applicants and shall consider qualified all persons meeting the following standards:

a. Age: between 18 and 25.

b. Education: high school graduate or the equivalent, i.e., a GED; and providing a high school transcript.

c. Health: no disabling physical defects for work at this trade.

d. Tests: passing score on the GATB aptitude test administered by the Washington State Division of Employment Security.

6. Defendant Ironworkers J.A.C. shall maintain a list of qualified apprentice applicants and shall consider qualified all persons who meet the following standards:

a. Age: between 18 and 30.

b. Education: completion of ten years of school and providing a high school transcript.

c. Health: no disabling physical defects for work at this trade.

d. Residency: a resident in the jurisdiction of Local 86 for one year prior to application except for veterans who apply within 90 days of discharge.

e. Tests: passing score on the GATB aptitude test administered by the Washington State Division of Employment Security.

There shall be no bases of qualification, disqualification, or priority other than those standards herein stated.

Affirmative Action: Regular Apprentice Program:

7. Defendant Apprenticeship Committees shall select and indenture a sufficient number of black applicants for apprenticeship to insure a reasonable level of participation sufficient to overcome the present effects of past discrimination. To assist Defendants in accomplishing this objective the Court sets forth the following guidelines:

a. The Plumbers and Pipe Fitters J.A.T.C. and the Sheet Metal Workers J.A.T.C. can accomplish a reasonable level of participation by selecting, to the extent there are blacks on the list of qualified apprentice applicants, a sufficient number of blacks so as to insure a minimum participation by blacks in the building trades' apprenticeship programs of 30 percent of each class, or seven new apprentices per respective J.A.T.C. per year, whichever is greater.

b. The Ironworkers J.A.T.C. can accomplish a reasonable level of participation by selecting, to the extent there are blacks on the list of qualified apprentice applicants, a sufficient number of blacks so as to insure a minimum participation by blacks in its apprenticeship program of 30 percent of each class, or six new apprentices per year, whichever is greater.

For the purpose of the guidelines presented in this paragraph, the phrase "minimum participation of blacks"

refers to participation both in the class of persons entering the apprentice program and the class of persons remaining in the program for more than three months. Blacks whose apprenticeships terminate in three months or less shall be replaced with newly indentured black apprentices to insure the required participation by blacks.

c. In order that opportunities for apprenticeships may be generally available, Defendant Contractors Associations shall use all possible means to provide as many apprenticeship positions as required to afford blacks a reasonable level of participation in the apprenticeship programs.

Affirmative Action: Training and Special Apprenticeship Programs:

8. Within 60 days from the entry of this Decree, Defendant Apprenticeship Committees shall develop and implement special apprenticeship programs emphasizing on the job training to meet the special needs of the following groups: overage black applicants with no previous experience or special skills in the trade; any black applicant of apprenticeable age or older who has some previous experience or special skills in the trade but does not meet journeyman standards. The foregoing programs shall be developed and implemented in consultation with the Advisory Committee hereinafter provided for.

a. Persons meeting the following criteria shall be considered qualified to enter the special apprenticeship programs:

Age: above the present apprenticeship age in each trade and below the age of 45. (This criteria should not apply to the second group of black applicants described above who are semi-skilled.)

Health: no disabling physical defects for work at the trade.

Recommendations: Providing a letter of recommendation from the Special Advisory Committee described in subparagraphs l and m, below, or from any organizations or individuals said Advisory Committee may designate for the purpose of giving letters of recommendation.

b. The Defendant Apprentice Committees may draw up reasonable standards in consultation with the Advisory Committee hereinafter provided for which participants must meet for continued participation in the special programs. The continuing acceptability of a participant's work to his contractor employer shall be considered a most important factor in determining whether the participant is making satisfactory progress and whether the criteria set up for continuing participation in the program are reasonable.

c. Each apprenticeship committee may impose reasonable limitations upon the size of its special apprenticeship class. Should the Plumbers and Pipe Fitters J.A.T.C. decide to set a ceiling, it should set that ceiling at such a level that it may reasonably anticipate an annual graduation class of at least 25 persons. Likewise, the Ironworkers J.A.C. and the Sheet Metal Workers J.A.T.C. should set their ceilings at such a level that they may reasonably anticipate annual graduation classes of at least 20 persons. In the event that the Electrical Workers J.A.T.C. becomes a participant in this action, it should set its ceiling at such a level that it could reasonably anticipate annual graduation classes of at least 25 persons.

d. The special program which the Plumber and Pipe Fitter Apprenticeship Committee prepares shall be designed to graduate special apprentices as journeymen after they have participated in the program for a period of three years or whatever lesser time the committee determines to be reasonably feasible. The ironworkers pro-

gram shall require 3,000 hours or two years or less, and the sheet metal program shall require two years or less, and any special apprenticeship program developed by the Electrical Workers J.A.T.C. shall require two years or less.

e. The rates of compensation for special apprentices shall be the same as the rates of compensation for normal apprentices.

f. When special apprentices are assigned onto a construction job they shall be in addition to, and not in lieu of, any employees or normal apprentices already on the payroll or who would normally be employed. They shall perform such work as has customarily been performed by apprentices in the particular craft during the past five years.

g. Pending the development and implementation of these programs by the apprenticeship committees, contractors with whom each union has a collective bargaining agreement shall establish and maintain a preapprentice program for blacks, notwithstanding any provisions in the collective bargaining agreements to the contrary. Defendant Locals shall cooperate in good faith with the contractors to insure that all such preapprentices receive on the job training of the nature customarily provided apprentices. Special preapprentices shall be compensated at rates equivalent to those paid regular apprentices.

Such preapprentices shall be in addition to and not in lieu of any employees or apprentices already on the payroll or who would normally be employed and shall perform such work as has customarily been performed by regular apprentices in the particular craft during the past five years.

h. Contractors with whom Local 86 has collective bargaining agreements shall establish, maintain, and make all good faith efforts to fill 20 preapprentice positions.

Contractors with whom Local 32 has collective bargaining agreements shall establish, maintain and make all good faith efforts to fill 25 positions. Contractors with whom Local 99 has collective bargaining agreements shall establish, maintain and make all good faith efforts to fill 20 positions, and contractors with whom Local 46 has collective bargaining agreements shall establish, maintain and make all good faith efforts to fill 25 positions.

i. Two months from entry of this order Defendant Locals shall transmit to plaintiff United States the following data: name, address, telephone number, wage scale, hours worked and employers of each black preapprentice employed in its craft during the previous two months. If any preapprentice leaves the program, or is dismissed from it, Defendant Locals shall submit a report to the plaintiff United States within ten days describing the reasons the preapprentice left the program and the steps taken by the Defendant Local to see that he remained in the program. Plaintiff shall review this data and submit to the Court with copies transmitted to the interested local a synopsis of the data and explanations therein contained along with any comments Plaintiff might wish to make.

j. Defendant Locals shall permit the contractors to replace any dropouts or terminations with new preapprentices so that the special preapprentice positions may be filled at all times.

k. When the special apprenticeship programs are finally developed and implemented by Defendant Apprentice Committees, the preapprentice program established by the contractors pursuant to subparagraph g of this Decree shall be superseded and all participating preapprentices shall be eligible to enter into the special apprenticeship program. The joint apprenticeship committees shall contact by mail all black preapprentices who have participated in the preapprenticeship programs, describing

the special apprenticeship programs and inviting each preapprentice to participate. Copies of these letters and any responses thereto shall be promptly forwarded to Plaintiff.

l. An Advisory Committee of nine members shall be established, two each from Labor, the Contractors' Associations, the black community, and the interested owners in this Court's cause numbers 8533, 8552 and 8566, namely, the State of Washington, King County and the Port of Seattle. The ninth member shall be a person from some minority group other than black. The black and minority representatives shall be appointed by such representative groups as designated by the Executive Director of the Washington State Board Against Discrimination. The two owner representatives shall be jointly appointed by the owner organizations mentioned above. All representatives shall be designated on or before July 7, 1970. Upon such designation, the Court shall be promptly advised thereof. The Advisory Committee may select a Chairman, Executive Board or any other internal organization device it deems appropriate to facilitate the accomplishment of its duties.

Funds required to defray the expenses incurred by the Advisory Committee shall be contributed equally by Defendant Unions and Defendant Contractor Associations until and to such extent that governmental or private funding, or some combination thereof, may be made available. Members of the Advisory Committee shall serve without compensation, provided, however, that the committee shall have the right to hire and compensate such staff as necessary to accomplish its purposes.

m. The Advisory Committee shall have the following responsibilities:

(i) Communication and interpretation within the black and other minority communities and within

their respective constituencies of the contents of this Order, along with information regarding the steps and general progress being accomplished in its implementation;

(ii) Cooperation and consultation with the appropriate apprenticeship committee, union and contractor organizations in attempting to formulate new or altered apprenticeship training programs;

(iii) When the special apprenticeship programs are finally drawn up by the apprenticeship committees, the Advisory Committee shall submit a report to the Court expressing its views thereon;

(iv) The committee shall issue the letters of recommendation provided for in subparagraph a, above, to persons who are likely to successfully complete the special apprenticeship training programs. The committee shall also have the power to designate other persons or organizations for the purpose of issuing such letters;

(v) Conciliation.

Records and Record Keeping:

9. Each joint apprenticeship committee shall maintain complete records of all applications and other material concerned with the selection and work records of both regular and special apprentices for the life of this Decree. These records shall include a serially numbered bound apprentice applicant log for each program showing the name, race and date of birth of each applicant, and dates of completion of each step in the application procedure and disposition of each application. All such records shall be made available for inspection and copying by plaintiff United States at reasonable intervals during normal working hours or at other mutually convenient times.

10. Defendant Apprenticeship Committees shall submit to this Court and to the plaintiff United States each four months for the life of this Decree a report detailing the efforts taken in compliance with the provisions of this Order, including copies of all correspondence and advertisements. The report shall state the number of persons who filed applications during that period, the names, addresses and telephone numbers of all black applicants. It shall also state the number of applicants by race, who have been selected as apprentices for the regular program. For any black applicant who is rejected or whose application becomes inactive during the reporting period, the report shall state the reasons therefor. For each black apprentice, the report shall indicate which program, regular or special, that he is participating in, shall show his work history during the reporting period, including the date of each referral, the name of each contractor to whom he was referred, and the number of hours worked as reflected by Health and Welfare reports for each contractor during the reporting period.

11. During the life of this Decree, if any black apprentice drops or is dropped from the "regular" or "special" apprenticeship programs described in paragraphs 7 and 8 of this Order, the applicable apprenticeship coordinator shall submit a report within ten days to the plaintiff United States stating the reason why the individual left the program and any steps taken by the committee to retain the individual in the program. The report shall also include the school and employment history of the individual while he was in the program, including the names of the contractors by whom he was employed.

Retention of Jurisdiction:

12. The Court shall retain jurisdiction of this case for such further relief as may be necessary or appropriate

to further effectuate equal employment opportunities. At any time after June 30, 1973, any defendant affected by this Order pertaining to training and apprenticeship programs may move this Court, on due notice, for termination of this Order or such modification as may be warranted under the circumstances then existing.

Costs:

13. Since the application of this Order is substantially prospective, the matter of costs is reserved and may be brought on with such motions as might be made under paragraph 12, above, or at such other time as may be considered appropriate.

PROVISIONS RELATING ONLY TO IRONWORKERS J.A.C.

14. The J.A.C. shall discontinue the use of the Flanagan Aptitude Test in all future screening of apprentice applicants. It may substitute the GATB aptitude test in which event such tests shall be by the Washington State Division of Employment Security.

15. Defendant J.A.C. shall contact the following black apprenticeship applicants by certified mail before July 15, 1970, explaining the requirements and procedures and offering them referral as regular or special apprentices—as their qualifications may dictate—in the first available apprenticeship class: Gregory Buford, James Cherry, William Fair, Leslie Johnson, Joseph Lyles and Errin Webb.

If the J.A.C. has not formulated its special apprenticeship program by July 15, 1970, it shall at least explain the classes of persons that qualify for the program, the type of training contemplated and the estimated time it will take an apprentice to graduate from the program.

PROVISIONS RELATING ONLY TO SHEET METAL WORKERS J.A.T.C.

16. Applications for apprenticeship shall be made available at all times during the normal business hours of the union and J.A.T.C. offices. In addition, the J.A.T.C. shall cease the practice of periodically closing the books to new applicants. Applications shall be continuously received by the J.A.T.C. even though the backlog of applicants is greater than the number of apprentice positions open.

17. Defendant J.A.T.C shall contact the following black apprenticeship applicants by certified mail before July 15, 1970, explaining the requirements and procedures of both the special and regular apprenticeship programs and offering them referral as regular or special apprentices—as their qualifications may dictate—in the first available apprenticeship class: Michael Ashley, Bruce Bibb, Willie Frazier, Robert L. Haddix, Anthony Robinson, Willie Thomas.

PROVISIONS RELATING ONLY TO PLUMBERS AND PIPE FITTERS J.A.T.C.

18. Defendant J.A.T.C. shall contact Ray Fairman and Roy Lawson by certified mail before July 15, 1970, explaining the requirements and procedures of both the special and regular apprenticeship programs and offering them referral as regular or special apprentices—as their qualifications may dictate—in the first available apprenticeship class. Applications for the regular construction apprenticeship program shall also be forwarded to each indentured black marine apprentice. Appropriate credit shall be given marine apprentices desiring to transfer to construction work for shipyard training experience, and the indentured black marine apprentices shall be advised of this fact.

PROVISIONS RELATING TO TRAINING IN THE ELECTRICAL TRADE

19. Local 46, Defendant Contractors' Associations and plaintiff United States shall forthwith take all steps available to them to persuade or require the Electrical Workers J.A.T.C. to intervene in this case as a party defendant for purposes of relief in respect to the operation of a special apprenticeship program similar to those described above. In entering this provision the Court does not intend to find nor imply that the Electrical Workers J.A.T.C. has discriminated against blacks, but enters same in an attempt to establish uniformity in procedures relative to the J.A.T.C.'s connected with the respective defendant unions found to have discriminated.

Until such time as the Electrical Workers J.A.T.C. shall become a party, the following program of affirmative action shall be employed in the electrical industry.

a. Local 46 shall permit contractors with whom it has collective bargaining agreements to establish and maintain 25 new positions each year for black trainees notwithstanding any provisions in the collective bargaining agreement to the contrary. Local 46 shall aid the employers in filling such positions and shall cooperate with them to insure that all such trainees receive on-the-job training of the nature customarily provided apprentices. Trainees shall be compensated at apprentice rates. A trainee who acquires two years of experience in a training position shall be paid at full journeyman's rates.

b. Every three months Local 46 shall transmit to plaintiff United States data showing the name, address, telephone number, wage scale, hours worked and employers of each black trainee employed during the previous three month period. If any black trainee leaves the

program, or is dismissed from it, Local 46 shall submit a report to the plaintiff United States within ten days describing the reasons the trainee left the program and the steps taken by Local 46 to see that the trainee remained in the program. In addition Local 46 shall permit the contractors to replace any dropouts or terminations with new trainees, so that the trainee positions may be filled at all times.

EFFECTIVE DATE

20. Except as otherwise provided, the provisions contained in paragraphs 8 and 19 shall become effective upon the filing of this Order. All other provisions, except as otherwise provided, shall become effective July 15, 1970.

Dated this 16th day of June, 1970.

WILLIAM J. LINDBERG
United States District Judge

EXHIBIT A

1. Urban League
   Smith Tower
   MA 2-2322
2. Multi Services Center
   2319 South Jackson
3. Concentrated Employment Program
   1519—12th
4. Seattle Opportunities Industrialization Center
   2332 East Madison Street
   EA 4-8270
5. Central Area Motivation Program
   722—18th Avenue
   EA 3-2824
6. NAACP
   152½—20th Avenue
   EA 4-6600
7. City of Seattle Human Rights Department
   Seattle Municipal Building
   583-2754
8. Washington State Employment Security Department
   515 Thomas Street
   464-7600
9. Seattle Community College
   1718 Broadway
   587-5454
10. AMCO
    215 Columbia
    MA 2-5060

United States District Court
Western District of Washington

United States of America, Plaintiff, vs. Local No. 86, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, et al., Defendant.	Civil Action. No. 8618.

SUPPLEMENTAL ORDER RELATIVE TO PREAPPRENTICE PROGRAM

(Entered September 30, 1970)

For the purpose of implementing this Court's prior decrees of June 16, 1970 and September 11, 1970, it is hereby

Ordered that:

1. The Special Apprenticeship Standards formulated by the defendant apprenticeship committees in consultation with the Court Advisory Committee, which are dated September 25, 1970, and attached hereto as a part of this Order, are approved by this Court and shall be immediately implemented.

2. All blacks currently employed as preapprentices shall continue such employment and be indentured as special apprentices. It shall be the duty of the defendant ap-

prenticeship committees working in conjunction with the Court Advisory Committee to see that this is accomplished as soon as practicable.

3. Special apprentices, if any are unemployed, shall be dispatched by the JATC to the employer who shall request dispatch of every tenth journeyman; provided, however, that such employer have at least five journeymen of that craft and shall not be at that time employing the maximum number of apprentices (including special apprentices) allowed or required by the collective bargaining agreement or apprenticeship standards.

In the event such employer refuses to hire or is so employing the maximum allowable apprentices (including special apprentices), or has insufficient employees, he shall so report such facts in writing to the dispatcher, and then the next employer requesting dispatch of a journeyman shall be dispatched a special apprentice.

In the event any employer shall refuse any special apprentice or fail to write the required letter, such refusal and the circumstances thereof shall be reported to the Advisory Committee within 48 hours, in the event of any complaint by a special apprentice. All records of requests, dispatches and letters shall be available to the Advisory Committee or its representative.

4. If in the future changes are necessary or desirable in either the formulation or application of the Special Apprenticeship Standards or the special apprentice dispatch procedures, they may be effectuated without further order of this Court provided that such changes are agreed to by the plaintiff United States, the defendant apprenticeship committee or committees, and the Court Advisory Committee. In the event that either party is in disagree-

ment with the proposed change or changes, the matter shall be submitted to the Court for decision.

Dated this 30th day of September, 1970.

s/ WILLIAM LINDBERG
United States District Judge

Presented by:

s/ FRANK PETRAMALO
FRANK PETRAMALO
Attorney
Department of Justice

APPENDIX D

Employment Practices Decisions

[¶ 8213] United States of America, Plaintiff-Appellee v. Ironworkers, Local 86 et al., Defendants-Appellants.

United States Court of Appeals, Ninth Circuit. No. 26,048. May 17, 1971.

On Appeal from United States District Court, Western District of Washington.

* * * * * * *

Affirming (DC Wash, 1970) 2 EPD ¶ 10,267, 63 LC ¶ 9488, 315 F. Supp. 1202. See also consent decree covering other defendants (DC Wash. 1970) 3 EPD ¶ 8065.

Frank Petramalo, Jr., Attorney, U. S. Department of Justice (David L. Rose and Robert T. Moore, Attorneys, U. S. Department of Justice, Jerris Leonard, Assistant Attorney General, Stan Pitkin, U. S. Attorney, Herman Siqueland, Duane Vance, Don Davidson and Alec Brindle, Attorneys, Seattle, Washington, of counsel), for Plaintiff-Appellee.

Hugh Hafer, Bassett, Donaldson & Hafer, Seattle, Washington (John E. Rinehart, Jr., Seattle, Washington, Harold Stern, New York, New York, Donald Fisher, Toledo, Ohio and Martin F. O'Donohue, Washington, D. C., of counsel), for Defendants-Appellants.

Before: HAMLIN and MERRILL, Circuit Judges, and HILL, District Judge*

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* Honorable Irving Hill, United States District Judge, Central District of California, sitting by designation.

[*Preliminary Statement*]

HAMLIN, C. J.: On October 31, 1969, the Attorney General of the United States[1] brought an action in the District of Columbia against five building construction unions[2] located in Seattle, Washington, and three joint apprenticeship and training committees associated with them.[3] The complaint alleged that the named unions and joint apprenticeship and training committees had denied employment opportunities to blacks on account of their race and that certain policies, practices and conduct described therein constituted a "pattern or practice" of resistance to full employments of blacks in violation of Title VII of the Civil Rights Act of 1964. 42 U. S. C. §§ 2000e *et seq.* The district court, William J. Lindberg, Chief Judge, found that

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[1] 42 U. S. C. § 2000e-6(a) reads:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action . . . requesting such relief, including an application for a permanent injunction or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice.

[2] Local 86, International Association of Bridge, Structural and Ornamental Ironworkers (hereinafter Ironworkers Local 86); Local 46, International Brotherhood of Electrical Workers (hereinafter Electrical Workers Local 46); Local 32, United Association of the Plumbing and Pipefitting Industry of the United States (hereinafter Plumbers and Pipefitters Local 32); Local 302, International Union of Operating Engineers (hereinafter Operating Engineers Local 302); Local 99, International Sheet Metal Workers Association (hereinafter Sheet Metal Workers Local 99).

[3] Ironworkers Joint Apprenticeship and Training Committee (hereinafter Ironworkers JATC); Plumbers and Pipefitters Joint Apprenticeship and Training Committee (hereinafter Plumbers and Pipefitters JATC); Sheet Metal Workers Joint Apprenticeship and Training Committee (hereinafter Sheet Metal Workers JATC).

all the named unions and joint apprenticeship and training committees had pursued a pattern or practice of conduct which denied blacks, on account of their race, equal employment opportunities in the construction industry; two judgments and decrees followed.[4] All but one of the defendants[5] have joined in the instant appeal.[6] We affirm.

[*Background of Lower Court's Findings*]

Many of the basic facts were largely undisputed and were stipulated by the parties. Appellant building trades unions are labor organizations which represent a large number of workmen employed in the construction industry in and about Seattle, Washington.[7] Through the union

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[4] Judge Lindberg's opinion is reported at [2 EPD ¶ 10,267, 63 LC ¶ 9488] 315 F. Supp. 1202 (W. D. Wash. 1970).

[5] Operating Engineers Local 32 was party to a consent decree and thus did not join in the appeal. The Ironworkers JATC chose not to join in the appeal and were represented by other counsel.

[6] After the court found that the unions and the joint apprenticeship and training committees had engaged in a pattern or practice of discrimination, the court, desiring to structure proper and effective relief, ordered the parties (Electrical Workers Local 46, defendant contractor associations and the United States) to "take all steps available to persuade or require" the Electrical Workers Joint Apprenticeship and Training Committee (hereinafter Electrical Workers JACT) to intervene for purposes of relief in respect to conduct of the apprenticeship program. The court specifically noted that it did not intend to find or imply that the Electrical Workers JATC had discriminated against blacks, but entered the order so as to impart "uniformity in procedures relative to the J. A. T. C.'s connected with the respective defendant unions found to have discriminated." While appellants take exception to this order, we see no error in the court requesting the full cooperation of the defendants in structuring appropriate relief.

[7] More specifically, the court found that the unions had the following membership: Iron Workers Local 86, approximately 920 members; Plumbers and Pipefitters Local 32, approximately 1900 members; Electrical Workers Local 46, approximately 1750 members; Sheet Metal Workers Local 99, approximately 900 members.

hiring halls, appellant unions effectively control a large percentage of the employment opportunities in the construction industry in that area. Under the bargaining agreements entered into between the contractor-employers and the unions, the unions must be given first opportunity to fill positions. Contractors may not employ non-union workers unless the positions are not filled by the unions within a period of time stipulated under the bargaining agreement.

The joint apprenticeship and training committees who join in this appeal are entities legally separate and distinct from the specific unions with which they are associated. The committees consist of members representing both the unions and the employers,[8] and are formed to oversee and run the apprenticeship programs whose purpose is to train apprentices to become journeymen in the respective trades. Once an applicant is accepted into the program,[9] he becomes indentured to the joint apprentice-

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[8] The Plumbers and Pipefitters JATC is comprised of five representatives of Local 32, and three representatives of the Seattle Plumbing and Pipefitting Employers, one representative of the Refrigeration Contractors Association and one member from the Puget Sound Shipbuilders Association. As for the Sheet Metal Workers JATC, the other committee joining in this appeal, it is comprised of eight members, four representatives of Local 99 and four representatives of contractors party to a collective bargaining agreement.

[9] The Sheet Metal Workers JATC provides an example of the process leading to acceptance into an apprentice program. An applicant must be between the ages of 18 and 24 (excluding time spent in the military service), pass a GATB aptitude test, complete an application form and submit a high school transcript before he is considered. Preference is given to high school graduates. Assuming these threshhold requirements are met, thereby allowing the applicant the right to be considered by the committee, he is then interviewed in order to evaluate his qualifications and the committee then votes whether to accept him or not. The chairman of the Sheet Metal Workers JATC indicated that they "will more or less look favorably on an individual who has family members who are sheet metal workers."

ship and training committee for a period of years[10] and participates in a program which consists of both on-the-job training and classroom instruction. It is through this program that participants gain admission to the union as a journeyman, thereby obviating the necessity of taking the avenue of direct admission which demands that an applicant meet certain requirements such as possessing a specified number of years of experience, being within a given age range, having letters of recommendation, and passing a journeyman's examination.

The court found appellant unions and joint apprenticeship and training committees to have engaged in a pattern or practice of discrimination which denied blacks employment opportunities in the construction industry. It based its conclusions on specific findings of discrimination which included (1) the employment of tests and admission criteria which had little or no relation to on-the-job skills and which had a differential impact upon blacks, and which operated to exclude them from entrance into the unions or referrals to available jobs; (2) the active recruitment of whites while at the same time giving little or no publicity to information concerning procedures for gaining union membership, work referral opportunities, and the operation of the apprenticeship training programs in the black community; (3) the granting of preferential treatment to friends and relatives of existing members of the unions; and (4) the differential application of admission requirements, often by-passing such requirements in cases of white applicants. In addition, several instances were shown where black workers who sought referrals were turned away without reason or after being given a spurious reason in support of its action; and in some cases,

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[10] The period of indenture differs between the appellant committees: Plumbers and Pipefitters JATC (five years), Sheet Metal Workers JATC (four years).

unions refused to place blacks on the referral lists, thus assuring their inability to secure work.

The relief granted by the court took the form of two judgments and decrees: the first related to the unions and the second related to the joint apprenticeship and training committees. In the first, the court enjoined the unions from engaging in future discrimination with respect to referrals for employment and the acquisition or retention of union membership. It ordered that the unions keep detailed records of their operations and actively disseminate information in the black community describing the operation of the referral systems, membership requirements and available job opportunities. Specific relief was granted by the court to certain individuals or groups of persons, ordering the unions to offer them immediate construction referrals in response to the next contractor requests for workers and to open their membership application lists to these persons. The court retained jurisdiction for such further relief as it deems necessary or appropriate to further effectuate equal employment opportunities.

Judgment and Decree No. 2 pertained to the joint apprenticeship and training committees. The committees were enjoined from all future discrimination against applicants for apprenticeship on account of their race. It further ordered the committees to disseminate information concerning the requirements and procedures for admission to the apprenticeship programs so as to apprise blacks within the geographical area of available opportunities. The respective committees were ordered to consider all applicants who met the standards set out by the court in the decree. In addition to the above, an affirmative action program was included in the decree in the hope of eradicating the vestiges of past discrimination. Among the provisions under this program were the creation of special apprenticeship programs designed to meet the special needs of overage blacks with no previous experience or

special skills in the trade, or black applicants who have some previous experience or special skills in the trade but do not meet journeymen standards. The court also retained jurisdiction over the committees in order to grant such further relief as it deems necessary.

I. Findings of Fact

We are confronted initially with the appellants' contention that the "clearly erroneous" rule[11] should not govern our review of the findings of fact made by the district court. They reason that the rationale underlying the rule is that an appellate court should defer to the judgment of the trial court because the trial judge had access to demeanor evidence and could readily assess the credibility of the witnesses. Hence, where, as they allege, "large reliance" is placed upon written instruments and depositions, they claim the rule does not apply as demeanor evidence played a small part in the trial judge's decision.

Appellants' characterization of the proceeding below as one in which the trial placed "large reliance" on documentary evidence and depositions ignores the fact that over fifty-five witnesses testified, many of whom were deponents prior to trial. Even if "large reliance" was placed on written evidence, the clearly erroneous rule would still apply. We examined this problem in *Lungren v. Freeman*, 307 F. 2d 104 (9th Cir. 1962), and found the better rule to be that the clearly erroneous rule does apply, even where the factual issues are decided on written evidence alone.[12] Appellants would have us review the evidence

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[11] See *Fed. R. Civ. P.* 52(a).

[12] A number of courts have held that in cases where the findings are based on documentary evidence, or uncontradicted testimony, on stipulated facts, or on testimony taken by depositions, the trial court's findings are given only slight weight on appeal. See, *e. g., Golena Oaks Corp. v. Scofield*, 218 F. 2d 217 (5th Cir. 1954); *Hart v. Gallis*, 275 F. 2d 297 (7th Cir. 1960). See generally, 5 *J. Moore, Federal Practice*, ¶ 52.04 (2d ed. 1959).

de novo and freely substitute our judgment for that of the trial judge. We decline to do so. The well-established rule is that we "may not substitute our judgment if conflicting inferences may be drawn from established facts by reasonable men, and the inferences drawn by the trial court are those which could have been drawn by reasonable men." *Lundgren, supra,* at 113. See also *Jacobson v. Colorado Fuel and Iron Corp.,* 409 F. 2d 1263, 1267 (9th Cir. 1969); *Friend v. H. A. Friend Co.,* 416 F. 2d 526, 531 (9th Cir. 1969); *United States v. Hanna Nickel Smelting Co.,* 400 F. 2d 944, 947 (9th Cir. 1968).

Appellants further contend that the district court's findings were based on evidence which it had previously excluded. Prior to trial, the Attorney General examined the application forms found in the files of the joint apprenticeship and training committees. At trial, appellants objected to the introduction of charts which were made from information found in the application forms on the ground that they did not qualify for admission under the business records exception to the hearsay rule.[13] The court, sustaining, in part, appellants' objection, held this evidence was inadmissible to prove the truth of the matters contained therein, but was admissible as evidence of the type of information sought by the committees and relied upon by them in reaching their evaluative decisions.

The contention of appellants is unsupportable, given the limited purpose for which the information contained in the applications was used. As we noted in *Phillips v. United States,* 356 F. 2d 297, 307 (9th Cir. 1965), *cert. denied,* 384 U. S. 952 (1966), where a similar argument was raised:

> The purpose of that section [Business Records Act, 28 U. S. C. § 1732, *as amended,* 28 U. S. C. § 1732 (Supp. IV 1961)] is to provide, in the case of business

[13] 28 U. S. C. § 1732, *as amended,* 28 U. S. C. § 1732 (Supp. IV 1961).

> records, an exception to the hearsay rule, and to provide an acceptable substitute for specific authentication of each business record. We are not here concerned with the hearsay rule because the letters and requests contained in exhibits 968 and 984 were not offered in proof of the statements contained therein. They were introduced only to show defendants had knowledge that such statements had been made. Nor are we concerned with authentication since the authenticity of the documents need not be established where the only purpose of the documents is to show notice.

Accord: United States v. Middlebrooks, 431 F. 2d 299, 301 (5th Cir. 1970). As in *Phillips, supra,* the information contained in the applications was not proffered to prove the statements therein, but to show what information was sought by the apprenticeship committees in the applications and relied upon by them in making their decisions. The application form information was properly admitted for this purpose.

The district judge's duty was to consider the evidence, reach all reasonable inferences therefrom, and make specific findings of fact and conclusions of law. This task was necessarily a difficult one and involved the review of extensive oral testimony, many depositions and a great amount of accompanying documentary evidence. Its proportions are reflected in the size of the reporter's transcript which alone numbers twenty volumes. In his carefully written and excellent opinion, covering some fifty pages, Judge Lindberg made separate findings of fact as to each party, carefully analyzing the supportive evidence found in the record. In these findings of fact Judge Lindberg has pointed out by page reference to the record, the testimony, stipulations, admitted facts, and exhibits upon which his findings were based. It would serve no purpose to repeat such references in this opinion. It is not our duty to re-

litigate the facts at this time. Having reviewed the findings below and the record before us, we are fully convinced that the findings are amply supported by the evidence.

II. Conclusions of Law

At the outset, appellants contest the use of racial statistics to prove a "pattern or practice" of discrimination as a matter of law. They categorize this mode of proof as a statistical "numbers game", incapable of proving a violation of Title VII. We believe this argument is without support as the use of statistics is well established in recent Title VII cases.[14]

In the district court's opinion, a separate statement was made as to each appellant concerning the racial composition of its membership. As to appellate unions, it was stated: Ironworkers Local 86 had approximately 920 members in January 1970, only one of whom was black,[15] Sheet Metal Workers Local 99 had approximately 900 members in its construction division, only one of whom was black;[16] and Plumbers and Pipefitters Local 32 had approximately 1900 members in its construction classifications, only one of whom was black.[17] In addition, with

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[14] The reliance upon statistical evidence to prove discriminatory practices is not new to the courts. See, *e. g., Swain v. Alabama,* 380 U. S. 202 (1965); *Patton v. Mississippi,* 332 U. S. 463 (1947); *Hill v. Texas,* 316 U. S. 400 (1942); *Norris v. Alabama,* 394 U. S. 587 (1935) (jury selection cases); *F. W. Woolworth Co.,* 25 NLRB 1362 (1940) (anti-union discrimination case). See generally, Fiss, *A Theory of Fair Employment Laws,* 38 *U. Chi. L. Rev.* 235 (1971).

[15] The black was Howard Lewis, who was admitted on September 12, 1969, pursuant to an order of the Washington State Board Against Discrimination.

[16] His name was Leonard O'Neale, a member of Local 99 since the summer of 1968.

[17] He was David Williams, a welder, who was accepted in a period where there was an acute shortage of welders, forcing Local 32 to recruit from the Boilermakers' Union.

respect to the appellant joint apprenticeship and training committees, the court noted: Sheet Metal Workers JATC had 100 apprentices indentured in its program and seven were black;[18] Plumbers and Pipefitters JATC had 104 building trades apprentices and none were black.

The district court also made a specific finding applicable to all parties concerning the racial composition of the City of Seattle where the main offices, hiring halls and training facilities of the appellants are found. Approximately 42,000 blacks reside in the City, constituting roughly seven percent of the population. This information came from an expert witness, a demographer, called to testify by the Attorney General.[19]

Since the passage of the Civil Rights Act of 1964,[20] the courts have frequently relied upon statistical evidence to prove a violation. This judicial practice has most often taken the form of the use of such data as a basis for allocating the burden of proof. On the basis that a showing of an absence or a small black union membership in a demographic area containing a substantial number of black workers raises an inference that the racial imbalance is the result of discrimination, the burden of going forward and the burden of persuasion is shifted to the accused, for such a

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[18] Five were accepted after September 1969, and the remaining two were accepted in May, 1968.

[19] Aside from their castigation of the use of such information as an engagement in a statistical "numbers game," appellants further contend that this data is irrelevant as the appellants' jurisdiction extends beyond the City of Seattle, rendering such statistics misleading. This is simply answered by the fact that the City has the single largest population within their jurisdiction and is that area from which they would most likely draw the vast majority of workers for apprenticeship, referral and membership purposes. We also recognize that appellants made no objection to this testimony at trial. We feel appellants' argument has no merit.

[20] Title VII of the Civil Rights Act of 1964 took effect on July 2, 1965.

showing is enough to establish a *prima facie* case.[21] In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved. One court, in *Parham v. Southwestern Bell Telephone Co.* [3 EPD ¶ 8021], 433 F. 2d 421, 426 (8th Cir. 1970), held as a matter of law, without other supportive evidence, that the statistics introduced showing an extraordinarily small number of black employees, notwithstanding a small number who held menial jobs, established a violation of Title VII. Of course, as is the case with all statistics, their use is conditioned by the existence of proper supportive facts[22] and the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn. It is our belief that the often-cited aphorism, "statistics often tell much and Courts listen,"[23] has particular application in Title VII cases.

Here, even if we were to accept appellant's assertion that statistics alone cannot show as a matter of law that there has been a violation, it would not command our overturning of the conclusions of law reached by the district court. We are not faced with a situation where a court has relied upon statistical data alone. On the contrary, in its findings, the district court cited specific instances of discrimination on the part of the unions and apprentice-

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[21] See, *e. g., United States v. Local 38, IBEW* [2 EPD ¶ 10,242, 63 LC ¶ 9463], 428 F. 2d 144, 151 (6th Cir. 1970); *EEOC v. Plumbers and Pipefitters Local 189* [2 EPD ¶ 10,205, 62 LC ¶ 9434], 311 F. Supp. 468 (S. D. Ohio 1970); *United States v. Hayes Int'l Corp.* [2 EPD ¶ 10,061, 60 LC ¶ 9303], 415 F. 2d 1038 (5th Cir. 1969); *United States v. Sheet Metal Workers Local 36* [2 EPD ¶ 10,083, 61 LC ¶ 9319], 416 F. 2d 123 (8th Cir. 1969).

[22] Fiss, *supra*, note 14, at 272-73. See also Note, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 *U. Chi. L. Rev.* 430, 461 (1965).

[23] *State of Alabama v. United States*, 304 F. 2d 583, 586 (5th Cir.), *aff'd per curiam*, 371 U. S. 37 (1962).

ship committees. Thus the statistical evidence is complementary rather than exclusive. We see no merit in appellants' complaint regarding the use of statistics.

Appellants next argue that the conclusions reached by the court that appellants engaged separately in a "pattern or practice of resistance" are wholly unsupportable. They equate the phrase "pattern or practice" with "uniformly engaged in a course of conduct aimed at denying rights secured by the Act." We felt that such an interpretation is overly restrictive and does violence to the meaning intended by Congress to be accorded the phrase. Moreover, it is our firm belief that the conclusions reached by the district court are not clearly erroneous and must be affirmed.

The phrase is not defined in Title VII, but some guidance is offered by an examination of the legislative history of this and other Civil Rights Acts employing the same words. Commenting on the meaning to be accorded the phrase in the debates on the Civil Rights Act of 1964, Senator Humphrey stated:

> . . . Such a pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine or of a generalized nature.[24]

In testimony before the House Judiciary Committee on the Civil Rights Act of 1960,[25] Deputy Attorney General Walsh said:

> Pattern or practice have their generic meanings. In other words, the court finds that the discrimination was not an isolated or accidental or peculiar event;

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[24] 110 *Cong. Rec.* 14270.

[25] 42 U. S. C. 1971(e).

that it was an event which happened in the regular procedures followed by the state officials concerned.[28]

In *United States v. Mayton*, 335 F. 2d 153, 158 (5th Cir. 1964), an action under the Civil Rights Act of 1960, in which the court found that racial discrimination in the voter registration process was pursuant to a "pattern or practice", the court addressed itself to defining the words and concluded that they "were not intended to be words of art." *See also United States v. Ramsey*, 331 F. 2d 824, 837 (5th Cir. 1964) (Judge Rives, concurring and dissenting in part). With respect to the phrase, Senator Keating commented that "[t]he 'pattern or practice' requirement means only that the proven discriminatory conduct of defendants was not merely an isolated instance of racial discrimination." 106 *Cong. Rec.* 7757.

We are firmly convinced that it was the intent of Congress that a "pattern or practice" be found where the acts of discrimination are not "isolated, peculiar or accidental" events. The words were not intended to be words of art. Applying this definition in the instant case, we are compelled to concur with the district court's findings that appellants engaged in a "pattern or practice" of discrimination. The findings are well documented with statistical evidence showing a distinct absence of black membership in the unions and the apprenticeship programs; the failure of the union hiring halls to grant blacks referrals; many overt acts of discrimination on the part of appellants; and many facially neutral employment practices which had a differential effect upon blacks. We are not concerned with isolated or accidental acts by appellants but a "pattern or practice" of resistance by them which has had an effect of denying black workers equal job opportunities in the Seattle area.

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[28] Hearings Before the House Committee on the Judiciary on H. R. 1037, 86th Cong. 2nd Sess. 13.

Therefore, we hold that the conclusions reached by the district court finding appellant unions and joint apprenticeship and training committees to have engaged in a pattern or practice of discriminatory conduct with respect to employment opportunities in the construction industry are not clearly erroneous.

III. Relief Granted

Appellants finally contend that the district court violated section 703(j) of the Act[27] in ordering appellant unions to offer immediate job referrals to previous discriminatees, and ordering appellant apprenticeship and training committees to select and indenture sufficient black applicants to overcome past discrimination, and to also meet judicially imposed ceiling requirements in apprenticeship program participation. This they condemn as "racial quotas" and "racial preferences." We cannot agree.

The Act vests in the Attorney General and the trial court power to eliminate both the vestiges of past discrimination and terminate present discriminatory practices. Under sections 706(g)[28] and 707(a),[29] unlawful employ-

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[27] 42 U. S. C. § 2000e-2(j). It provides:

Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist . . . .

[28] 42 U. S. C. ¶ 2000e-5(g) reads:

If the court finds that the respondent has intentionally engaged in or is engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief as may be appropriate . . . .

[29] See note 1 *supra*.

ment practices may be enjoined by the court and such affirmative relief granted as the court may deem appropriate. The only statutory limitation on the availability of relief is the anti-preferential treatment provision of section 703(j).

There can be little doubt that where a violation of Title VII is found, the court is vested with broad remedial power to remove the vestiges of past discrimination and eliminate present and assure the non-existence of future barriers to the full enjoyment of equal job opportunities by qualified black workers. *Parham v. Southwestern Bell Telephone Co.* [3 EPD ¶ 8021], 433 F. 2d 421, 427 (8th Cir. 1970); *United States v. International Brotherhood of Electrical Workers, No. 38,* [2 EPD ¶ 10,242, 63 LC ¶ 9463] 428 F. 2d 144, 151 (6th Cir. 1970); *Local 53 of International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler,* [1 EPD ¶ 9952, 59 LC ¶ 9195] 407 F. 2d 1047, 1052-53 (5th Cir. 1969); *United States v. Hayes International Corp.,* 415 F. 2d 1038, 1039 (5th Cir. 1969). *Cf. Swann v. Charlotte-Mecklenberg Board of Education,* ... U. S. ... (April 20, 1961). On the basis of this broad equitable power, the courts have allowed a wide range of remedial relief. *See, e.g., Electrical Workers Local 38, supra,* (remand to district court with direction to fashion appropriate affirmative relief); *Parham, supra,* (remand to the district court with directions to retain jurisdiction to assure compliance); *Griggs v. Duke Power Co.,* [2 EPD ¶ 10,143, 61 LC ¶ 9379] 420 F. 2d 1225 (4th Cir. 1970), *aff'd* [3 EPD ¶ 8137] ... U. S. ... (March 8, 1971) (immediate work referral or union membership); *Hayes International Corporation, supra* (preliminary injunction); *Sheet Metal Workers Local 36, supra* (publication of the fact that membership and related benefits were open to all persons and an affirmative duty of minority recruitment); *United States v. Plumbers Local 73,* [2 EPD ¶ 10,093, 61 LC ¶ 9329] 314 F. Supp. 160 (S. D.

Ind. 1969) (revamping of apprenticeship program). Without such powers, the district court would be unable to effectuate the desire of Congress to eliminate all forms of discrimination.

In *Vogler, supra* at 1053-1055, the district court ordered, in addition to an injunction against future discrimination and the immediate admission of four discriminatees, that the union develop objective criteria for membership and union size. As here, it was contended that the order established a "quota system to correct racial imbalance in violation of section 703(j)." Rejecting this argument, the court held the district court did "no more than ensure that the injunction against further racial discrimination would be fairly administered." *Id.* at 1054. The *Vogler* court succinctly stated that "where necessary to insure compliance with the Act, the District Court was fully impowered to eliminate the present effects of past discrimination." Similarly, in *International Brotherhood of Electrical Workers, Local No. 38, supra* at 149, the court felt that such an interpretation of section 703(j) "would allow a complete nullification of the purposes of the Civil Rights Act of 1964."

We therefore reject appellants' contention. The district court neither abused its discretion in ordering the affirmative relief, nor did it in any way establish a system of "racial quotas" or "preferences" in violation of section 703(j).

The judgment of the district court is affirmed.

APPENDIX E

United States Court of Appeals
For the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. Ironworkers Local 86; Sheet Metal Local 99; et al., Defendants-Appellants.	No. 26048 DC# 8618 Civil

JUDGMENT

Appeal from the United States District Court for the Western District of Washington.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is affirmed.

A True Copy

Attest: Jun. 16, 1971

Wm. B. Luck, Clerk

By /s/ Emil E. Melfi, Deputy

Filed and entered May 17, 1971.